

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE
OF ELIZABETH S. MORGAN, DECEASED, PETI-
TIONER,**

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 19, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. _____

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

Index to Printed Record of Proceedings before the United States Board of Tax Appeals.....	i
Clerk's Certificate to Printed Record of Proceedings before United States Board of Tax Appeals.....	107

INDEX TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS.

Placita	109
Appearance for Petitioner, filed April 1, 1938.....	109
Appearance for Respondent, filed June 4, 1938.....	110
Order taking cause under advisement, entered Novem- ber 11, 1938	111
Opinion by Treanor, J., filed April 22, 1939.....	112
Judgment affirming, entered April 22, 1939.....	124
Clerk's Certificate	125
Order allowing certiorari	126

TRANSCRIPT OF RECORD

IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

No. 6611

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH
S. MORGAN, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Counsel for Petitioner:

MR. BRODE B. DAVIS,
MR. ARTHUR M. KRACKE.

Counsel for Respondent:

MR. JAMES W. MORRIS,
MR. SEWALL KEY.

Petition for Review of Decision of the United States Board of Tax Appeals.

TRANSCRIPT OF RECORD FILED MAR. 31, 1938.
PRINTED RECORD.

U. S. C. C. A.
FILED

MAY 5 - 1938

FREDERICK G. CAMPBELL

IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

No. 6611

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH
S. MORGAN, DECEASED,**

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Counsel for Petitioner:

**MR. BRODE B. DAVIS,
MR. ARTHUR M. KRACKE,**

Counsel for Respondent:

**MR. JAMES W. MORRIS,
MR. SEWALL KEY,**

Petition for Review of Decision of the United States Board of Tax Appeals.

INDEX.

Docket entries	1
Petition, filed Jan. 23, 1936	2
Exhibit A—Order granting letters testamentary...	8
Exhibit B—Deficiency letter dated Nov. 12, 1935, to J. Earl Morgan, Executor.....	10
Statement	11
Exhibit C—Trust Agreement, dated May 12, 1917..	13
Exhibit D—Last Will and Testament of Isaac Stephenson, dated June 15, 1916.....	38
Codicil dated June 21, 1916.....	70
Second Codicil dated Jan. 16, 1917.....	72
Third Codicil dated May 15, 1917.....	73
Answer, filed Mar. 16, 1936.....	74
Stipulation of Facts	75
Exhibit 1—Last Will and Testament of Elizabeth S. Morgan, dated Apr. 20, 1933.....	79
Opinion, promulgated Sept. 30, 1937.....	91
Notice of proposed redetermination	96
Recomputation of Estate Tax Liability.....	97
Motion of petitioner for review by entire Board, and order of Nov. 10, 1937, denying same.....	98-99
Decision, entered Dec. 17, 1937	99
Notice of filing petition for review.....	100
Petition for review, filed Mar. 9, 1938.....	101
Praecipe for record	105
Certificate of Clerk	106



Docket Entries.

1

1 J. Earl Morgan, Executor of the
Estate of Elizabeth S. Morgan,
Dec'd,

Petitioner,

Docket No. 82771.

vs.

Commissioner of Internal Revenue,

Respondent.

Appearances:

For Petitioner: Arthur M. Kracke, Esq.

For Respondent: H. F. Noneman, Esq., Frank T.
Horner, Esq., R. F. Staubly, Esq.

DOCKET ENTRIES.

1936

Jan. 23—Petition received and filed. Taxpayer notified.
(Fee paid.)

Jan. 23—Copy of petition served on General Counsel.

Mar. 16—Answer filed by General Counsel.

Mar. 19—Copy of answer served on taxpayer.

1937

Mar. 10—Hearing set April 13, 1937.

Apr. 13—Hearing had before C. Rogers Arundell on the
merits. Stipulation of facts filed. Taxpayer's brief due May
28, 1937. Respondent's brief due June 28, 1937. Petitioner's
reply due July 13, 1937.

Apr. 27—Transcript of hearing April 13, 1937 filed.

May 10—Brief filed by taxpayer. 5/10/37 copy served on
General Counsel.

June 25—Brief filed by General Counsel.

July 10—Reply brief filed by taxpayer. Copy served on
General Counsel.

Sept. 30—Opinion rendered—C. R. Arundell, Division 7.
Decision will be entered under Rule 50.

Nov. 1—Motion for a review by the entire Board filed by
taxpayer.

Nov. 10—Order denying review by the entire Board en-
tered.

Nov. 24—Notice of proposed redetermination filed by Gen-
eral Counsel.

Nov. 30—Hearing set Dec. 15, 1937 on settlement.

Dec. 15—Hearing had before Mr. Van Fossan, Division 9, on settlement under Rule 50—not contested—referred to Mr. Arundell for decision.

Dec. 17—Decision entered—C. R. Arundell, Division 7.

1938

Mar. 9—Petition for review by U. S. Circuit Court of Appeals, Seventh Circuit, with assignments of error filed by taxpayer.

Mar. 9—Proof of service filed by taxpayer.

Mar. 9—Praecipe for record filed—proof of service and agreement endorsed thereon.

UNITED STATES BOARD OF TAX APPEALS.

J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, <i>Petitioner,</i>	} Docket No. 82771.
<i>vs.</i> Commissioner of Internal Revenue.	

PETITION.

Filed Jan. 23, 1936.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols M.T.—E.T.—C1—3099 Wisconsin) dated November 12, 1935, and as a basis for his proceedings alleges as follows:

I. The petitioner, an individual, duly appointed Executor of the Estate of Elizabeth S. Morgan, deceased, on the 6th day of June, 1933, resides at 610 Algoma Boulevard, Oshkosh, Wisconsin. A copy of Letters Testamentary are attached hereto as Exhibit "A" and made a part hereof.

II. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "B") was mailed to the petitioner on November 12, 1935.

III. The taxes in controversy are Federal Estate taxes. The deceased died on May 3, 1933. The deceased was a citizen of the United States and a resident of the State of Wisconsin. The deficiency asserted is \$43,977.93, which, together with any accrued interest, is the amount in controversy.

IV. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the gross estate of the decedent, the respondent has erroneously included the value of property over which the decedent was donee, of only a special power of appointment, under the provisions of the Last Will and Testament of Isaac Stephenson, deceased.

(b) In determining the gross estate of the decedent, the respondent has erroneously included the value of property, over which the decedent was donee, of only a special power of appointment, under the provisions of a certain Deed of Trust by Isaac Stephenson to J. A. Van Cleve and others, dated May 12, 1917.

(c) In determining the gross estate of the decedent, the respondent has erroneously included the value of property, over which the decedent was donee, of a power of appointment, under the provisions of the Last Will and Testament of Isaac Stephenson, deceased, which said power of appointment was not a general power of appointment within the meaning of Section 302 of the Revenue Act of 1926.

(d) In determining the gross estate of the decedent, the respondent has erroneously included the value of property, over which the decedent was donee of a power of appointment, under the terms of a certain Deed of Trust by Isaac Stephenson to J. A. Van Cleve and others, dated May 12, 1917, which said power of appointment was not a general power of appointment within the meaning of Section 302 of the Revenue Act of 1926.

(e) In determining the gross estate of the decedent, the respondent has erroneously computed and determined the value of the stock of the Stephenson Redwood Company.

(f) In determining the gross estate of the decedent, the respondent has erroneously determined the value of the land and timber located in Humboldt County, California, which are the only assets of the Stephenson Redwood Company.

(g) In determining the gross estate of the decedent, the respondent has erroneously computed and determined the value of the notes of the Stephenson Redwood Company.

(h) The respondent has erroneously computed and determined the Federal Estate Tax on the estate of the decedent, Elizabeth S. Morgan.

(i) The respondent has failed and refused to allow Executor's Commission as a deduction against the gross estate of the decedent.

(j) The respondent has failed and refused to allow attorney's fees as a deduction against the gross estate of the decedent.

(k) The respondent has failed and refused to allow credit and deduction from the gross estate of the decedent for State estate, inheritance, legacy or succession taxes paid by the petitioner.

V. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) Under date of June 15, 1916, Isaac Stephenson signed, sealed, published and declared his Last Will and Testament. Under date of June 21, 1916, Isaac Stephenson signed, sealed, published and declared a Codicil to his said Last Will and Testament of June 15, 1916. Under date of January 16, 1917, Isaac Stephenson signed, sealed, published and declared a second Codicil to his Last Will and Testament of June 15, 1916, and the first Codicil of June 21, 1916. Under date of May 15, 1917, Isaac Stephenson signed, sealed, published and declared a third Codicil to his Last Will and Testament of June 15, 1916, the first Codicil of June 21, 1916 and the second Codicil of January 16, 1917.

Isaac Stephenson, the above described testator, died March 15, 1918. He was at the date of his death a citizen and resident of the City and County of Marinette and State of Wisconsin.

On May 7, 1918, Letters Testamentary were issued to J. A. Van Cleve and others, as Executors of the Estate of Isaac Stephenson, deceased. The above described Last Will and Testament of Isaac Stephenson and the first, second and third Codicils of the Last Will and Testament of the said Isaac Stephenson, were on said 7th day of May, 1918, duly admitted to probate in the said deceased's estate by the County Court in and for the County of Marinette, and State of Wisconsin.

The said Last Will and Testament and the first, second and third Codicils thereto of Isaac Stephenson above referred to, are attached hereto as Exhibit "C" and made a part hereof.

Under the provisions of the said Last Will and Testament and Codicils of Isaac Stephenson, described as aforesaid, the testator devised and bequeathed to the appointee or appointees of his daughter, Elizabeth S. Morgan, the decedent herein, certain property, which property was a part of the assets of the estate of the said Isaac Stephenson who predeceased his daughter Elizabeth S. Morgan.

Section 302 of the Revenue Act of 1926 provides in part as follows:

"Sec. 302, Act of 1926. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—• • •"

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life, or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property, or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and • • •"

The Statutes of the State of Wisconsin provide in part as follows:

"Sec. 232.05 and Sec. 232.06:

Sec. 232.05. General power. A power is general when it authorizes the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power to any alienee whatever.

Sec. 232.06. Special Power. A power is special: (1) When the persons or class of persons to whom the disposition of the lands under the power to be made are designated;

(2) When the power authorizes the alienation by means of a conveyance, will or charge of a particular estate or interest less than a fee."

7 The provisions and terms used and employed by Isaac Stephenson in his said Last Will and Testament created under the Revenue Act of 1926 and the Statutes of the State of Wisconsin, a special power of appointment and not a general power of appointment.

(b) Under date of May 12, 1917, the same Isaac Stephenson described in sub-paragraph (a) immediately preceding, executed a certain Deed of Trust to J. A. Van Cleve and others, a copy of which said Deed of Trust is attached hereto as Exhibit "d" and made a part hereof.

Under the provisions of the aforesaid Deed of Trust of Isaac Stephenson described as aforesaid, the trustor directed the trustees under said Deed of Trust, if Elizabeth S. Morgan should die prior to the termination of the trust, to pay annually

the net income from her part of the trust property to such person or persons as she may appoint by her Last Will and Testament, and at the termination of the trust said trustees were directed to transfer the property in their possession constituting Elizabeth S. Morgan's part of the trust estate to such person or persons as she may appoint. Elizabeth S. Morgan died prior to the termination of the said trust.

The provisions and terms used and employed by Isaac Stephenson in his said Deed of Trust created, under the Revenue Act of 1926, and the Statutes of the State of Wisconsin, a special and not a general power of appointment.

(c) The Commissioner of Internal Revenue has included in the gross estate of the decedent, Elizabeth S. Morgan, her portion of the value of 2000 shares of Stephenson Redwood Co. stock. The entire assets of the said Company consist of a track of redwood timber in Humboldt County, California.

8 The value of the stock of Stephenson Redwood Co. at the date of the death of Elizabeth S. Morgan, as determined by the Commissioner, is greatly in excess of the fair market value of the said land and timber.

9 Based on cruises made by reputable cruisers, the estimated footage of available merchantable timber in the tract in question should not exceed 275,000,000 feet, and based on the value of said footage and the land on the date of the death of Elizabeth S. Morgan, as established by reputable appraisers, the value of the said stock of Stephenson Redwood Co. should not exceed \$100,000.00.

(d) The Commissioner of Internal Revenue has, in arriving at the value of the gross estate of the decedent, included the decedent's proportion of \$184,500.00 of the notes of the Stephenson Redwood Co. The total amount of the said notes exceed the value of the total assets of Stephenson Redwood Co. In addition to including the decedent's proportionate part of the total amount of the notes at full face value, the Commissioner has included, as the decedent's proportion of the stock of Stephenson Redwood Co., an amount greatly in excess of its fair market value. The total value of the Stephenson Redwood Co. notes and stock should not be included in an amount in excess of the total value of the assets of the said corporation.

(e) The estate of the decedent has incurred charges by the executor of said estate and by the attorney for said estate. Allowance has been made by the County Court of Winnebago County, Wisconsin, in which court the said estate is being

administered, for an executor's Commission of \$2,185.64 and Attorney's fees of \$2000.00. The foregoing allowances are proper deductions against the gross estate of the decedent, in computing the Federal Estate Tax.

9 (f) The estate of the decedent has paid inheritance, legacy and succession taxes in the sum of \$8,800.89. The said estate of the decedent is entitled to an inheritance tax credit of not to exceed eighty per cent of the tax imposed by Section 301 of the Revenue Act of 1926.

Wherefore, the petitioner prays that the Board may hear this proceeding and find and determine as follows:

(a) That the power of appointment to the decedent, Elizabeth S. Morgan, contained in the Last Will and Testament of said Isaac Stephenson, deceased, is a special power and not a general power within the intent and meaning of the Statutes of the Wisconsin in such case made and provided and of Section 302 of the Revenue Act of 1926.

(b) That the power of appointment to the decedent, Elizabeth S. Morgan, contained in the Deed of Trust of Isaac Stephenson, dated May 12, 1917, is a special power and not a general power within the intent and meaning of the Statutes of the State of Wisconsin in such case made and provided and of Section 302 of the Revenue Act of 1926.

(c) That there shall not be included in the gross estate of the decedent, Elizabeth S. Morgan, any of the property either income or principal, over which the decedent was given the power of appointment, either under and by reason of the provisions of the Last Will and Testament of Isaac Stephenson, deceased, or under and by reason of the provisions of the Deed of Trust of Isaac Stephenson, both of which instruments are hereinabove more particularly set forth.

(d) That a fair market value of all of the assets of
10 Stephenson Redwood Co. may be ascertained and determined.

(e) That a fair market value of the notes of Stephenson Redwood Co. may be ascertained and determined.

(f) That a fair market value of the stock of Stephenson Redwood Co. may be ascertained and determined.

(g) That in computing the Federal Estate Tax a fair and reasonable amount should be allowed for Executor's Commission and Attorney's fees, as a deduction against the gross estate of the decedent.

(h) That in computing the Federal Estate tax there shall be allowed, as an inheritance tax credit, an amount paid, which

does not exceed eighty per cent of the tax imposed by Section 301 of the Revenue Act of 1926.

(i) That in computing the correct Federal Estate tax the petitioner may have such other and further relief to which the petitioner may be entitled under the Revenue Acts of 1926 and 1932.

Arthur M. Kracke,
Arthur M. Kracke,
Attorney for Petitioner,
209 South LaSalle Street,
Chicago, Illinois.

of Counsel:

Thompson, Gruenewald & Frye,
812 First National Bank Building,
Oshkosh, Wisconsin.

State of Wisconsin, }
County of Winnebago. } ss.

J. Earl Morgan, being first duly sworn says that he is the
Executor of the Estate of Elizabeth S. Morgan, deceased;
11 that he has read the above and foregoing petition; that
he is familiar with the statements therein contained and
that the facts stated therein are true.

(Signed) J. Earl Morgan.

Subscribed and sworn to before me this 20 day of January,
A. D. 1936.

(Seal)

(Signed) M. C. Hansen,
Notary Public.

12

EXHIBIT "A".

STATE OF WISCONSIN, COUNTY COURT, WINNEBAGO COUNTY.

In the Matter of the
Estate of Elizabeth S. Morgan, }
Deceased. }

The State of Wisconsin, To all to Whom These Presents Shall
Come or may concern, and especially to J. Earl Morgan of
the City of Oshkosh, County of Winnebago, in the State of
Wisconsin, Greeting:

Whereas, on the 6th day of June, 1933, the last will and
testament of Elizabeth S. Morgan, deceased, late of the City

of Oshkosh, in said County, was duly allowed and admitted to probate, and

Whereas, you have been appointed by the Court as executor pursuant to the said last will and testament and the order of the Court and the will providing that you shall be exempt from giving bond.

Now, Therefore, Reposing full confidence in your integrity and ability the Court has granted and by these presents does grant the administration of all and singular the goods, chattels, rights, credits and estate unto you, as executor pursuant to said last will and testament and with all the power, authority and privilege conferred, and subject to all the duties, liabilities and penalties imposed by law and the orders, rules and regulations of this Court.

Hereby Conferring upon you the authority and power to take and have possession of all the real and personal estate, except the homestead, of said deceased; to receive the rents and profits thereof until said estate shall have been settled, or until delivered, by order of said Court, to the persons entitled thereto; to demand, collect, recover and receive all and singular the debts, claims, demands, rights and choses in action which to said decedent while living and at the time of her death did belong; and to keep in good tenantable repair all houses, buildings and fences on said real estate which may and shall be under your control; and hereby requiring you to make and return into the said County Court, within three months, a true inventory of all the goods, chattels, rights, credits and estate of said decedent, whether disposed of by will or not, which shall come to your possession or knowledge, or to the possession of any other person for you; to administer, according to law and said last will and testament, all the goods, chattels, rights, credits and estate of said decedent, which shall at any time come to your possession; or to the possession of any other person for you; and out of the same to pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said Court; to render a true and just account of your administration to said Court within one year, and at any other time when required by said Court; and finally to perform all orders and decrees of said Court by you to be performed in the premises.

In Testimony Whereof, I, D. E. McDonald, Judge of said Court, have signed these presents and affixed the seal of the

Court, hereto, at the City of Oshkosh in said County, this 6th day of June, 1933.

D. E. McDonald,
Judge.

(Winnebago County)
(Court)
(Seal)
(Wisconsin)

MT-ET-C1—3099-Wisconsin
Estate of—Elizabeth S. Morgan
Date of Death—May 3, 1933

Nov. 12, 1935

J. Earl Morgan, Executor,
610 Algoma Boulevard,
Oshkosh, Wisconsin.

Sir:

A deficiency of \$43,977.93 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination, and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date

of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

Guy T. Helvering,

Commissioner,

By D. S. Bliss,

Deputy Commissioner.

Enclosures:

Statement,

Waiver, Form 890.

JFM:KRU

14 MT-ET-C1-3099-Wisconsin
Estate of Elizabeth S. Morgan

Statement.

The protest relates to the following:

	Powers of Appointment	Re- turned	Tentatively Determined	Determined
Decedent's 1/7 interest in the estate of Isaac Stephenson as set forth in Bureau letter dated July 6, 1935		\$ 0.00	\$ 41,212.82	\$ 41,212.82
Decedent's 1/8 interest in the Isaac Stephenson Trust as set forth in Bureau letter dated July 6, 1935		0.00	325,613.51	325,613.51

After a careful review of all the evidence of record, it appears that the above items were properly included in the decedent's gross estate, as the decedent had exercised a general power of appointment over each of the trusts in question.

A review of the evidence of record as to the value of the

Stephenson Redwood Company stock, and the notes of the Stephenson Redwood Company, included in the Isaac Stephenson Trust, has been made and it appears that these items were conservatively valued and no adjustments are warranted.

The following computation shows a Federal estate tax liability which is hereby made final:

Gross Estate	\$224,450.39	\$591,741.02	\$591,741.02
Deduction (1926 Act)	116,861.16	112,673.16	112,673.16
Net estate (1926 Act)	\$107,589.23	\$479,067.86	\$479,067.86
Net Estate (1932 Act)	\$157,589.23	\$529,067.86	\$529,067.86
Gross tax (1926 Act)	\$ 1,727.68	\$ 16,453.39	\$ 16,453.39
Credit for State estate, inheritance, legacy, or succession taxes	1,382.14	0.00	0.00
Net tax (1926 Act)	\$ 345.54	\$ 16,453.39	\$ 16,453.39
Total gross taxes (1926 and 1932 Acts)	\$ 10,183.03	\$ 52,778.82	\$ 52,778.82
Gross tax (1926 Act)	1,727.68	16,453.39	16,453.39
Net additional tax	8,455.35	36,325.43	36,325.43
Net tax (1926 Act)	345.54	16,453.39	16,453.39
Total net tax	\$ 8,800.89	\$ 52,778.82	\$ 52,778.82
Total net tax returned			8,800.89
Deficiency			\$ 43,977.93

15 Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, \$30,815.22 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State or Territorial estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations No. 80. If, after a reasonable time, the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per

annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

16

EXHIBIT "C".

Know All Men By These Presents, Whereas, It has been my observation that many widows and children have been unable to properly preserve the principal of the fortunes they have inherited, and I desire to provide for the support of my beloved wife, Martha E. Stephenson, and my children and grandchildren, so that my wife shall always have a sufficient income and shall not be wholly dependent upon what she may receive from my estate, and so that my children and grandchildren shall be insured a comfortable living for many years after my death, and also to make ample provision for myself during my life and before the infirmities of old age shall have dulled my intellect;

Now, Therefore, I, Isaac Stephenson, of Marinette, Wisconsin, in consideration of the above premises and in order to accomplish my desires, in consideration of natural love and affection, and for value received, have transferred, assigned, and set over, and by these presents do transfer, assign and set over to such of the following named persons as shall accept in writing, as hereinafter provided, the duties of the trust herein contained; namely, my friends J. A. Van Cleve of Marinette, Wisconsin, and Horace A. J. Upham of Milwaukee, Wisconsin, and my sons-in-law Harry J. Brown of Marinette, Wisconsin, and J. Earl Morgan of Oshkosh, Wisconsin, my son Grant T. Stephenson, and myself, as Trustees as herein provided, the survivor and survivors of them, and their successor and successors in trust, all of the property described and itemized in paragraph number 27 of this instrument, to have and to hold the same from the date hereof and during the continuance of the lives of my wife, Martha E. Stephenson, and myself, and twenty-one years thereafter; all in trust nevertheless to receive, hold, care for and manage the same, and to receive the rents, issues, income and profits thereof, and to apply them to the uses and for the purposes hereinafter provided.

This trust shall become effective upon the acceptance thereof by any three of the persons above named as Trustees.

1. After deducting all taxes, assessments, expenses and other expenditures herein authorized to be paid out of the

annual income of the property held in trust by said Trustees they shall pay monthly, on the 10th day of each month, from the date hereof until my death, to each of the following named persons while living, the sum following his or her name, such payment to cease if he or she shall die before me, namely:

To my wife, Martha E. Stephenson, the sum of Three Hundred Dollars.

To the widow of my son Isaac Watson Stephenson the sum of Two Hundred Dollars, provided always that she shall remain unmarried, and which payment shall cease after her remarriage.

17 To my daughter, Georgianna Ludington, the sum of Two Hundred Dollars.

To my daughter Elizabeth S. Morgan the sum of Two Hundred Dollars.

To my daughter Mary Brown the sum of Two Hundred Dollars.

To my daughter Harriet Augusta Skidmore the sum of Two Hundred Dollars.

To my daughter Maggie Hodgins or to her daughter Margaret Two Hundred Dollars.

To my son Grant T. Stephenson or to his wife Irene E. Stephenson Two Hundred Dollars.

To my grandson Howard S. George One Hundred Dollars.

To my grandson Isaac S. George One Hundred Dollars.

To my friend Maria Sinclair Russell, of Milwaukee, Wisconsin, Twenty-Five Dollars.

To myself the sum of Two Thousand Dollars, upon the 10th of each month, and the balance of the annual income of all of said trust property after the payments of the sums herein directed to be paid therefrom, shall be paid to me annually during my life.

2. Upon my death said Trustees shall divide all the trust property then in their hands, of whatever nature and kind it may be, into nine parts and shall number said parts from one (1) to nine (9), both inclusive, subject to reduction in the number thereof as hereinafter provided.

Said Trustees shall have full power and authority to determine what items of property shall be assigned to each part, and what portions or interests, either divided or undivided, or some divided and some undivided, of said trust property shall constitute each one of the said nine parts into which they shall divide the same. The parts may consist of different kinds of property, but when such division shall have been made, each

one of said parts shall have a value that shall be equal to each of the other of said parts as near as may be in the judgment of said Trustees; and when such division shall have been made and the parts numbered by said Trustees the same shall be final and conclusive as to all parties who may be or become interested therein.

3. After my death and during the life of my wife, Martha E. Stephenson, said Trustees shall pay to her annually the net annual income of part numbered nine (9). Upon the death of my wife part nine (9) shall cease to exist, and whatever may then remain in the hands of said trustees of said part 18 nine (9) they shall transfer and distribute equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, and be held and disposed of the same as is herein provided for the holding and disposal of said then other existing remaining parts.

If my wife, Martha E. Stephenson, shall not survive me, the number of the parts into which the trust property in the hands of said Trustees at the time of my death shall be divided shall be one part less, and there shall be no part numbered nine (9).

4. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to the children of my son Isaac Watson Stephenson, in equal parts, the net annual income of part numbered eight (8), or themselves expend and use the said net annual income of said part numbered eight (8) for the welfare and support of said children.

Upon the termination of this trust said Trustees shall transfer to the two (2) children of my son Isaac Watson Stephenson, share and share alike, whatever may then remain in the hands of said Trustees of said part eight (8). In the event of the death of either child of my son Isaac Watson Stephenson, its surviving issue, if any, shall take and enjoy what the parent would have taken and enjoyed if living. If there be no such surviving issue, or all such issue shall die, then the other child of my son Isaac Watson Stephenson, if living, and if not living, its surviving issue, shall take and enjoy the same. The surviving issue of each deceased child of my son Isaac Watson Stephenson shall take per stirpes and not per capita what its parent would have taken if living.

If after my death and prior to the termination of this trust, all the children of my son Isaac Watson Stephenson and all

their issue shall have died, then said part eight (8) shall cease to exist, and shall not thereafter be entitled to any additions from any other part, and whatever may then remain in the hands of said Trustees of said part eight (8), they shall transfer to and distribute equally among all of the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, and be held and disposed of the same as is herein provided for the holding and disposal of said then other existing remaining parts.

If, prior to my death, all the children of my son Isaac Watson Stephenson and all of their issue shall have died, the
19 number of the parts into which the trust property in the hands of said Trustees at the time of my death shall be divided, shall be one part less, and there shall be no part numbered eight (8).

5. After my death, and during the continuance of the trust hereby created, said Trustees shall pay annually to the children of my daughter Ella J. George, in equal parts, the net annual income of part numbered seven (7), or themselves expend and use the said net annual income of said part numbered seven (7) for the welfare and support of said children.

Upon the termination of this trust said Trustees shall transfer to the two (2) children of my daughter Ella J. George, share and share alike, whatever may then remain in the hands of said Trustees of said part seven (7). In the event of the death of either child of my daughter Ella J. George, its surviving issue, if any, shall take and enjoy what the parent would have taken and enjoyed if living. If there be no such surviving issue, or all such issue shall die, then the other child of my daughter Ella J. George, if living, and if not living, its surviving issue, shall take and enjoy the same. The surviving issue of each deceased child of my daughter Ella J. George shall take per stirpes and not per capita what its parent would have taken if living.

If, after my death and prior to the termination of this trust, all the children of my daughter Ella J. George and all their issue shall have died, then said part seven (7) shall cease to exist, and shall not thereafter be entitled to any additions from any other part, and whatever may then remain in the hands of said Trustees of said part seven (7) they shall transfer to and distribute equally among all the then other existing re-

maining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, and be held and disposed of the same as is herein provided for the holding and disposal of said then other existing remaining parts.

If prior to my death all the children of my daughter Ella J. George and all their issue shall have died, the number of the parts into which the trust property in the hands of said Trustees at the time of my death shall be divided, shall be one part less, and there shall be no part numbered seven (7).

6. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Georgianna Ludington the net annual income from said part numbered six (6).

If my daughter Georgianna Ludington shall be living
20 at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part six (6).

If my daughter Georgianna Ludington should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part six (6) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part six (6) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Georgianna Ludington, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part six (6) or of the property constituting said part six (6) at the termination of said trust, then and in any such event the annual income from said part six (6), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to her issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part six (6), or the part thereof not disposed of as aforesaid, to the then surviving issue of my said daughter, such issue, taking per stirpes and not per capita, both as to income and principal; Provided, if at any time before the termination of said trust there should be no issue of

my said daughter then surviving, then and in that event any portion of the income of said part six (6), and at the termination of said trust any portion of the principal thereof, not disposed of by my said daughter in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided as aforesaid.

In case of the contingency that my daughter Georgianna Ludington should die after my death and prior to the termination of this trust, leaving no issue her surviving, or leaving issue all such issue should die before the termination of this trust, and she shall have failed to make any appointment in the manner aforesaid, then upon the happening of such contingency said part six (6) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part six (6) in the hands of said Trustees upon the happening of such contingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

21 Should my daughter Georgianna Ludington die prior to my death, leaving no issue surviving her, and without leaving any last will and testament naming therein such appointee or appointees to receive after her death all such property that said Trustees would have paid and transferred to her, as aforesaid, if she had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered six (6).

7. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

If my daughter Elizabeth S. Morgan should die prior to the termination of said trust, then said Trustees shall pay

annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part five (5) or of the property constituting said part five (5) at the termination of said trust, then and in any such event the annual income from said part five (5), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to her issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), or the part thereof not disposed of as aforesaid, to the then surviving issue of my said daughter, such issue taking per stirpes and not per capita, both as to income and principal; Provided, if at any time before the termination of said trust there should be no issue of my said daughter then surviving, then and in that event any portion of the income of said part five (5), and at the termination of said trust any portion the principal thereof, not disposed of by my said daughter in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided, as aforesaid.

22 In case of the contingency that my daughter Elizabeth S. Morgan should die after my death and prior to the termination of this trust, leaving no issue her surviving, or leaving issue all such issue should die before the termination of this trust, and she shall have failed to make an appointment in the manner aforesaid, then upon the happening of such contingency said part five (5) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part five (5) in the hands of said Trustees upon the happening of such contingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts

into which said Trustees shall have divided such trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Should my daughter Elizabeth S. Morgan die prior to my death, leaving no issue surviving her, and without leaving any last will and testament naming therein such appointee or appointees to receive after her death all such property that said Trustees would have paid and transferred to her, as aforesaid, if she had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered five (5).

8. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Mary Brown the net annual income from said part numbered four (4).

If my daughter Mary Brown shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part four (4).

If my daughter Mary Brown should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part four (4) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part four (4) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Mary Brown, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part four (4) or of the property constituting said part four (4) at the termination of said trust, then and in any such event the annual income from said part four (4), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to her issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part four (4), or the part thereof not disposed of as aforesaid, to the then surviving

issue of my said daughter, such issue taking per stirpes and not per capita, both as to income and principal; Provided, if at any time before the termination of said trust there should be no issue of my said daughter then surviving, then and in that event any portion of the income of said part four (4), and at the termination of said trust any portion of the principal thereof, not disposed of by my said daughter in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided, as aforesaid.

In case of the contingency that my daughter Mary Brown should die after my death and prior to the termination of this trust, leaving no issue her surviving, or leaving issue all such issue should die before the termination of this trust, and she shall have failed to make any appointment in the manner aforesaid, then upon the happening of such contingency said part four (4) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part four (4) in the hands of said trustees upon the happening of such contingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Should my daughter Mary Brown die prior to my death, leaving no issue surviving her, and without leaving any last will and testament naming therein such appointee or appointees to receive after her death all such property that said Trustees would have paid and transferred to her, as aforesaid, if she had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered four (4).

9. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Harriet Augusta Skidmore the net annual income from said part numbered three (3).

• If my daughter Harriet Augusta Skidmore shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part three (3)

24 If my daughte. Harriet Augusta Skidmore should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part three (3) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part three (3) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Harriet Augusta Skidmore, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part three (3) or of the property constituting said part three (3) at the termination of said trust, then and in any such event the annual income from said part three (3), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to her issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part three (3); or the part thereof not disposed of as aforesaid, to the then surviving issue of my said daughter, such issue taking per stirpes and not per capita, both as to income and principal: Provided, if at any time before the termination of said trust there should be no issue of my said daughter then surviving, then and in that event any portion of the income of said part three (3) and at the termination of said trust any portion of the principal thereof, not disposed of by my said daughter, in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided, as aforesaid.

In case of the contingency that my daughter Harriet Augusta Skidmore should die after my death and prior to the termination of this trust, leaving no issue her surviving, or leaving issue all such issue should die before the termination of this trust, and she shall have failed to make any appointment in the manner aforesaid, then upon the happening of such contingency said part three (3) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part three (3) in the hands of said Trustees upon the happening of such con-

tingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Should my daughter Harriet Augusta Skidmore die prior to my death, leaving no issue surviving her, and without
25 leaving any last will and testament naming therein such appointee or appointees to receive after her death all such property that said Trustees would have paid and transferred to her, as aforesaid, if she had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered three (3).

10. After my death and during the continuance of the trust hereby created, said trustees shall pay annually to my daughter Maggie Hodgins the net annual income from said part numbered two (2).

If my daughter Maggie Hodgins shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part two (2).

If my daughter Maggie Hodgins should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part two (2) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part two (2) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Maggie Hodgins, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part two (2) or of the property constituting said part two (2) at the termination of said trust, then and in any such event the annual income from said part two (2), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to her issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their posses-

sion, constituting said part two (2), or the part thereof not disposed of as aforesaid, to the then surviving issue of my said daughter, such issue taking per stirpes and not per capita, both as to income and principal; Provided, if at any time before the termination of said trust there should be no issue of my said daughter then surviving, then and in that event any portion of the income of said part two (2) and at the termination of said trust any portion of the principal thereof, not disposed of by my said daughter in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided, as aforesaid.

In case of the contingency that my daughter Maggie Hodgins should die after my death and prior to the termination of this trust, leaving no issue her surviving, or
26 leaving issue all such issue should die before the termination of this trust, and she shall have failed to make any appointment in the manner aforesaid, then upon the happening of such contingency said part two (2) shall fail to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part two (2) in the hands of said Trustees upon the happening of such contingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Should my daughter Maggie Hodgins die prior to my death, leaving no issue surviving her, and without leaving any last will and testament naming therein such appointee or appointees to receive after her death all such property that said Trustees would have paid and transferred to her, as aforesaid, if she had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered two (2).

11. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my son Grant T. Stephenson the net annual income from part numbered one (1).

If my son Grant T. Stephenson shall be living at the time

of the termination of this trust, said Trustees shall transfer to him all property then in their possession constituting said part one (1).

If my son Grant T. Stephenson should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part one (1) to such person or persons as he may appoint by his last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part one (1) to such person or persons as he may appoint in the manner aforesaid.

If my son Grant T. Stephenson, dying as aforesaid, should fail to make such appointment in the manner aforesaid, or making an appointment in the manner aforesaid should fail to dispose of the entire net annual income of said part one (1) or of the property constituting said part one (1) at the termination of said trust, then and in any such event the annual income from said part one (1), or the part thereof not disposed of in the manner aforesaid, shall be paid annually by said Trustees to his issue surviving the time or times respectively when such installments of net annual income shall become payable; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part one (1), or the part thereof not disposed of as aforesaid, to the then surviving issue of

27 my said son, such issue taking per stirpes and not per capita, both as to income and principal: Provided, if at any time before the termination of said trust there should be no issue of my said son then surviving, then and in that event any portion of the income of said part one (1) and at the termination of said trust any portion of the principal thereof, not disposed of by said son in the manner aforesaid, shall be by said Trustees transferred to and distributed equally among all the other then existing remaining parts into which said trust property shall have been divided, as aforesaid.

In the case of the contingency that my son Grant T. Stephenson should die after my death and prior to the termination of this trust, leaving no issue him surviving, or leaving issue all such issue should die before the termination of this trust, and he shall have failed to make any appointment in the manner aforesaid, then upon the happening of such contingency said part one (1) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all property constituting said part one (1) in the hands

of said Trustees upon the happening of such contingency shall be transferred to and distributed by said Trustees equally among all the then other existing remaining parts into which said Trustees shall have divided said trust property, and thereafter the same shall constitute a portion of said then other existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Should my son Grant T. Stephenson die prior to my death, leaving no issue surviving him, and without leaving any last will and testament naming therein such appointee or appointees to receive after his death all such property that said Trustees would have paid and transferred to him, as aforesaid, if he had lived, then said Trustees shall divide at the time of my death all the trust property then in their hands into one less part, and there shall be no part numbered one (1).

12. Said Trustees are authorized to make, if they deem best, payments from time to time in any year to any beneficiaries of this trust on account of what shall be coming to such beneficiary out of the net annual income for that year of any part of the trust property, prior to the time when such net income shall be definitely determined; and when such net annual income shall have been determined and collected, the said Trustees shall pay the balance, if any, due to such beneficiaries.

13. Whenever an infant shall be entitled to any income, said Trustees are authorized to accumulate during the minority of such infant so much of such income as said Trustees may deem unnecessary to expend for its welfare and support. In case of the accumulation of such income, said Trustees shall pay to such infant the amount of such accumulation upon its reaching the age of majority, or at the expiration of this trust, if this trust shall terminate before such infant shall attain its majority.

14. In case of the death of any person entitled to any income from any of the parts into which the trust property shall have been divided, said Trustees shall pay to the estate of such persons so deceased what said Trustees shall determine to be due out of the net annual income of said parts in which such person shall be interested up to the time of such person's death.

15. Whenever, in the judgment of said Trustees, there shall be danger that any portion or portions of the trust prop-

erty coming to any beneficiary under this trust, whether income or corpus, as hereinbefore provided, will be dissipated or improvidently handled through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influences of others affecting business capacity, or for any other reason or reasons, said Trustees shall withhold, if they deem it best, from every such beneficiary the whole or any and each portion of the trust property, whether of income or corpus, coming to such beneficiary as unworthy to receive the same, and said Trustees shall pay and transfer to every such beneficiary only so much of said trust property, whether of income or corpus, otherwise coming to such beneficiary, as said Trustees shall deem advisable. Said trustees shall, if they deem it best, instead of paying and transferring to any such beneficiary or beneficiaries any portion of said trust property, whether of income or corpus, expend the same, or any portion thereof, for the welfare and support of such unworthy beneficiary or beneficiaries.

Whatever shall have been once withheld, as above provided, from any such unworthy beneficiary under this trust and shall not have been expended by such Trustees for the benefit and support of such unworthy beneficiary, shall be paid and transferred by said Trustees to such of his or her issue as would have taken the property so withheld, both income and corpus, in case such unworthy beneficiary had died intestate at the time of such withholding; and in the event of there being no such issue at the time any such trust property shall be payable or transferable, then said Trustees shall pay and transfer and distribute such property so withheld to and among the then other existing remaining parts.

Whenever, and while in the judgment of said Trustees the reason or reasons for withholding the portion or portions thereof of any beneficiary, as above provided, shall have ceased to exist, then during such cessation said Trustees may pay and transfer to such beneficiary any portion or portions of said trust property, whether income or corpus, that shall thereafter be coming to such beneficiary under any of the provisions of this trust, or said Trustees shall expend the same for the benefit or support of such beneficiary.

16. For the period of ten years after the date hereof, said Trustees are recommended, but not commanded, not to cause the red wood lands situated in the state of California, now owned by the Stephenson Redwood Company, to be sold or

disposed of, and during said period of ten years not to
29 sell or dispose of any of the shares of the capital stock
of said corporation last mentioned, and, so far as possible,
to vote all such shares of stock and so manage the affairs
of said corporation last mentioned as to keep and preserve
during the period of ten years from the date hereof all
of said redwood lands.

17. Said Trustees are authorized to organize or cause to
be organized, a corporation or corporations under the laws of
the state of Wisconsin, and for any of the purposes specified
in any such laws, and also under the laws of any of the states
or territories of the United States, and for any of the purposes
specified in any such laws, and also to join with any
other person or persons in the organization of any such corporation,
and also to subscribe for and take stock in such corporation
and to pay over or transfer to any such corporation or corporations
any money or property in the hands of said Trustees as the consideration
for the stock of any such corporation or corporations.

18. In case of the receipt by said Trustees from any corporation,
partnership, syndicate, trust, association or any other concern
of any dividend or distribution of money or property, said Trustees
shall examine into the sources of such money or property, or both,
so received, and determine whether the same has been derived from
earnings made by such corporation, partnership, syndicate, trust,
association, or other concern, after the date hereof, or has been
derived from its capital assets, including surplus and undivided
profits possessed by it at the time of the date thereof. So much
of every such dividend or distribution as said Trustees shall determine
to have been derived from earnings made after the date hereof shall
be distributed among the beneficiaries of this trust as income, and
so much thereof as said Trustees shall determine to have been derived
from such capital assets, surplus and undivided profits shall be retained
by said Trustees as corpus or principal of the trust property. The
decision of said Trustees in determining how much of every dividend
or distribution of money and property, as aforesaid, shall be considered
as income and how much thereof shall be considered corpus, shall be
final and conclusive.

19. Said Trustees are authorized to deal with and make contracts
and agreements with and in regard to and loan money to, with or
without security, and take additional stock or interest in, and purchase
and acquire all the property, or

any part thereof, of any corporation, syndicate, trust, partnership, association, estate, or other concern in which said Trustees, as such, or I, or the executors or trustees of my will, may be interested, either as a stockholder, owner, creditor, contributor, manager, or otherwise and notwithstanding the fact that said Trustees, or some one or more of them, may also have a personal or representative interest in such corporation, syndicate, trust, partnership, association, estate, or other concern, or be a director or directors, trustee or trustees, executor or executors, agent or agents, or an officer or officers thereof; such contracts, agreements, loans and subscriptions for additional stock or interest, purchases and acquisition of property, to be upon such terms and conditions, and for such length of time, and at such rate of interest as said Trustees shall deem best; the authority and power of said Trustees with reference to such contracts, agreements, loans and subscriptions for additional stock or interest, and the purchase or acquisition of property to be as full, extensive and complete as those which I would possess and could exercise in respect thereto if I still were the owner of said trust property.

Said Trustees are given full power to make contracts with any other person, agent, trustee or officer, or stockholder or shareholder of any such corporation, syndicate, trust, partnership, association, estate, or other concern, in regard to any of the affairs thereof, the same as I could do if I still were the owner of said trust property.

20. Said Trustees are given the entire management and control of all the trust property hereby transferred, assigned and set over to them and which they may hereafter acquire, the same as I could do if I were the sole owner thereof. Said Trustees are authorized to sell, negotiate, exchange, hypothecate and pledge any and all personal property as they shall deem best; also to invest, re-invest and keep invested all moneys that shall come in any way into their hands and which they are not otherwise directed to dispose of. They are authorized to change from time to time all investments, converting realty into personalty and personalty into realty, as they shall deem best, and to collect and receive the principal as well as the income of all investments and other property coming into their hands, with authority to make investments in real estate by purchase or otherwise, and in the certificates, stocks, notes, bonds or other obligations of corporations, either private, public or municipal, associations, trusts and

individuals, and whether or not such certificates, stocks, notes, bonds, or other obligations be secured or unsecured, as they shall deem best. Said Trustees are given full authority to execute all deeds, mortgages, leases, releases, assignment, declarations, contracts, notes, bonds and other written instruments necessary, suitable or convenient, as they shall deem best to carry out the provisions of this instrument.

Said Trustees are authorized to purchase, acquire and hold real estate, and any interest therein, and to sell, convey, lease, and mortgage all real estate, and any and every part thereof, and any interest therein, upon which terms and conditions and for such prices and for periods of time, for cash or deferred payments, or partly both, and either at public or private sale, and to accept such securities and other property in payment thereof, all as said Trustees may deem best.

31 Said Trustees are authorized to collect and receive rents, profits and issues of all trust property, real and personal, in their care, and all money and property coming from the selling, leasing, mortgaging or other disposal of any and every portion thereof. They are authorized to build, rebuild upon and otherwise improve real estate and any and every portion thereof, and interest therein, and to repair and otherwise improve any building thereupon, as they shall deem best.

Said Trustees are given full authority to compromise, compound and otherwise settle any claim or claims whatsoever due them, or made against them, by anyone whomsoever, and whether any such claim is capable of being enforced in any court or not, all in such manner as said Trustees shall deem best; also with authority to submit to arbitrators selected as said Trustees may deem best any matter or controversy concerning any of said trust property in their care, and to carry out the decision of such arbitrators and to appeal therefrom; also with authority to extend the time of payment of any and every indebtedness due them from time to time as they see fit; and said Trustees shall not be held liable in case of the loss of any such part or portions thereof by reason of any such extensions. Said Trustees are not expected to convert the stocks, bonds, notes, mortgages and other securities hereby transferred to them into cash, or to enforce the collection of any loans made by me, unless said Trustees deem it best so to do. Said Trustees, and no one of them, shall be held individually liable for any depreciation after the date hereof in value of any part of said trust property, however or when-

ever acquired, or for any other loss thereto, in case they shall deem it best not to convert any of the trust property into cash, or not to enforce the collection of any loans made by me or by them.

The powers enumerated in this item are not intended to revoke, limit or modify the other specific directions contained in this instrument.

21. Each of said Trustees shall be reasonably compensated for the services rendered by him.

Said Trustees are authorized to employ agents and attorneys to aid them, and to incur all expenses that are necessary or reasonable for the management and care of the trust property.

Out of the annual income of the whole trust property during each year of my life, said Trustees shall pay such of the following expenditures as shall belong to such year, so as to obtain the net annual income for the year, to-wit: All taxes and assessments, general and special, license fees, expenses of the management and care of the trust property, salaries and charges of agents and attorneys employed by them; reasonable compensation to each of said Trustees, all repairs to property; costs of abstracts; commissions; premiums for insuring the fidelity of employees and others, and insuring the trust property against loss by fire, and any other casualty, and against claims by others against said Trustees and said trust property for accidents to life and property; and 32 all other suitable and proper expenditures and disbursements relating to the management and care of said trust property, and to enable said Trustees to perform their duties.

After my death the net annual income of each part into which said trust estate shall have been divided, shall be obtained by deducting from the annual income of each part all the expenditures above enumerated that are chargeable for the year to such part.

Should there be in any year any extraordinary expenditure for any of the above matters, said Trustees are authorized to distribute such extraordinary expenditure over a series of years to be fixed by said Trustees, so that not to diminish too much the net income for any one year, and for such purpose said Trustees are authorized to pay such extraordinary expenditures, or portions thereof, out of corpus to be repaid corpus out of the income of the succeeding year or years of such series.

22. The survivors and survivor, and successors and successor in trust of said Trustees, and such of them as shall act under this trust, shall, respectively, have and enjoy all the powers, duties, privileges, rights, exemptions and the right to use his or their discretion in certain matters that are specifically given to said Trustees respectively named in this trust, the same as if the words "the survivors and survivor of them, their successors or successor in trust, and such of them as shall act under this trust" had been inserted in this instrument next after the word "trustees" in every instance where such word "trustees" is used in this instrument.

23. No Trustee acting under this trust shall be held personally liable for any of the acts or defaults of any co-trustee. So long as any Trustee under this trust shall have acted honestly and in good faith, he shall not be liable in any way to any beneficiary thereof for any loss or damage that may arise or grow out of any of his acts as such Trustee.

24. In order for any person named as Trustee upon the first page hereof to qualify and become a Trustee empowered to act as such hereunder, he shall evidence his acceptance of said trust by executing and acknowledging the acceptance hereto appended.

25. Whenever there shall be a vacancy, as hereinafter defined, in the number of Trustees acting under this trust, the remaining acting Trustees shall appoint in writing, duly witnessed, sealed and acknowledged as deed are required to be so as to be entitled to be recorded under the laws of Wisconsin, some person to fill such vacancy. Such appointment may be annulled in the same way any time before it shall have been accepted. The acceptance of such appointment must be

in writing, signed, sealed, witnessed and acknowledged as
33 deeds are required to be in order to be recorded under the laws of Wisconsin, and no such appointment shall take effect or have force until after such appointment shall have been approved by the Judge of the Circuit Court of Marinette County, Wisconsin, and shall have been filed in the office of the Clerk of said Court.

Any Trustee may at any time resign his office as Trustee, provided all the remaining then acting Trustees shall unanimously accept such resignation. Such resignation must be in writing, signed, sealed, witnessed and acknowledged as deeds are required to be in order to be recorded, as aforesaid. No such resignation shall take effect or have any force

until after the Trustee wishing to resign shall have executed and delivered to the other than acting Trustees a full and proper conveyance of all his interest in all the trust property, and until after such resignation shall have been approved by the Judge of the Circuit Court of Marinette County, Wisconsin, and shall have been filed in the office of the Clerk of said Court.

During my lifetime the number of Trustees of the trust hereby created shall be six (6), and after my death the number of said Trustees shall be five (5). There shall be a vacancy in the number of Trustees whenever the number of such acting Trustees is less than six or five, as above stated. A vacancy may be caused by death, resignation, incompetency, insolvency, or neglect to perform the duties of Trustee, or failure of any of the persons named as Trustee upon the first page hereof to accept such trust prior to my death and within two years from the date hereof. In case of the incompetency or insolvency of any Trustee, or neglect of any Trustee to perform the duties of Trustee, the Circuit Court of Marinette County, Wisconsin, may create a vacancy by removing from office any such incompetent or insolvent Trustee, or Trustee neglecting his duties. In case of the threatened insolvency of any Trustee, such Court may require such Trustee to give suitable bond to protect the trust property.

Whenever the number of acting Trustees shall be less than three (3), such acting Trustees or Trustee shall perform no duties under this trust except those of appointing some person or persons to fill such vacancy or vacancies, and of collecting money payable to the Trustees, and disbursing money owing by the Trustees, and preserving the trust property. Whenever the number of such acting Trustees is three (3) or more, such acting Trustees may perform all the duties of Trustees under this trust.

The name of this trust shall be "Isaac Stephenson Trust," and the Trustees are authorized to use this name in their transactions. The decision of the majority of the acting Trustees at any time shall be taken as the decision of and be binding upon all the Trustees, and the doing of any act in pursuance of the decision of and by the majority of such acting

Trustees, shall be of the same force and effect as if said
34 act was done by all such Trustees. Such decision of the majority may be evidenced by some written instrument, signed by the majority of such acting Trustees. Any deed,

contract, or other instrument duly executed by a majority of the Trustees acting at the time, shall have the same force and effect as though executed by all the Trustees at such time.

26. The word "issue" wherever used in this instrument shall be construed to mean all lawful descendants to the remotest degree, such descendants to be determined according to the laws of Wisconsin, and to be limited to the heirs of the body of the ancestor named.

27. The following is an itemized description of all the property mentioned on the first page of this instrument, and hereby transferred, assigned and set over to said Trustees, to-wit:

Bonds of the United States of America, Panama Canal, Registered 3%, dated October 29, 1912:	
Par value	\$100,000.00
Bonds of Government of Philippine Islands, Registered 4%, dated February 1, 1910, par value..	
Dated January 21, 1910, par value.....	25,000.00
Dated December 11, 1909, par value.....	50,000.00
Bonds of United States of America, 3% Loan of 1898, Registered, dated December 14, 1909, par value	
Dated February 1, 1910, par value.....	50,000.00
Bonds of United States of America, 4% of 1895, Registered, dated May 1, 1903, par value.....	
Dated April 15, 1910, par value.....	17,000.00
Dated May 2, 1910, par value.....	100,000.00
Dated May 1, 1910, par value.....	50,000.00
Dated Jan. 12, 1912, par value.....	50,000.00
Bonds of Government of The Dominion of Canada, 5% Coupon, dated April 1, 1916, par value.....	
Dated February 1, 1917, par value.....	100,000.00
Bonds of United Kingdom of Great Britain and Ireland, 5½% Coupon, dated November 1, 1916, par value	
Dated February 1, 1917, par value.....	50,000.00
Bonds of County of Sacramento, California, roads and highways, 4½%, dated July 1, 1908, par value	
Bonds of Milwaukee County Home for Dependent Children, 4½%, dated October 15, 1912, par value	20,000.00
Bonds of Milwaukee County House of Correction, 4½% dated August 5, 1914, par value.....	46,000.00
City of Milwaukee Sewerage Bonds, 4½% dated July 1, 1915, par value.....	15,000.00
	50,000.00

Exhibit C.

35

City of Milwaukee Park Bond, 4½%, dated January 1, 1915, par value.....	5,000.00
City of Milwaukee School Bonds, 4½%, dated January 1, 1915, par value.....	30,000.00
35 West Chicago Park 4% Bonds, dated April 1, 1906, par value.....	6,000.00
City of London, Ontario, 5% Bonds dated February 1, 1916, par value.....	25,000.00
Chicago Union Station 4½% Bonds, dated January 1, 1916, par value.....	75,000.00
Chicago Railway Company, 5% Bonds, dated February 1, 1907, par value.....	25,000.00
Peoples Gas Light & Coke Company, 5% Bonds dated September 1, 1897, par value.....	50,000.00
St. Louis, Peoria & Northwestern Railway Company 5% Bonds dated July 1, 1913, par value..	100,000.00
Kansas City Terminal Railway Company, 4% Bonds, dated January 3, 1910, par value.....	25,000.00
2,000 shares of stock of the Wells Building Company, par value.....	200,000.00
Certificates of I. Stephenson Co. Trustees for beneficial interest of 27,886½ parts out of 80,000 parts of trust created by trust agreement dated July 5, 1912; as amended by supplemental agreement dated March 19, 1912; no par value.	
2,471 shares of stock of the Marinette & Menominee Paper Company, par value.....	247,100.00
200 shares of stock of the Stephenson Charcoal Iron Co., par value.....	5,000.00
32.1375 shares of stock of the Ludington, Wells & Van Schaick Co., par value.....	321.38
3,413 shares of the Ludington, Wells & Van Schaick Lumber Co., par value.....	3,413.00
358 shares of stock of the Menominee & Marinette Heat, Light & Traction Co., par value.....	35,800.00
250 shares of stock of the Reno Realty Company, par value	25,000.00
2,000 shares of stock of the Stephenson Redwood Company, par value.....	200,000.00
60 shares of stock of the Ionic Company, par value	6,000.00
2,788.65 shares of stock of the I. Stephenson Lumber Co., 75% of par paid in—par value \$1.00 per share—paid in value.....	2,091.48
69.7 shares of stock of the I. Stephenson Company, par value	697.00

7,999 shares of stock of the Escanaba River Company, par value.....	7,999.00
53,326 shares of stock of the Ford River Lumber Company, par value.....	1,333.15
438 shares of stock of The H. Witbeck Company, par value	438.00
Promissory notes of the Wells Building Company, upon which there is unpaid principal to the amount of	17,900.00
36 Promissory notes of the I. Stephenson Co. Trustees,	
Nos. 151 292 361 479	
" 154 316 439 465	
" 194 348 440 466	
" 195 349 449 467	
" 196 350 450 513	
" 262 351 451 540	
" 263 352 452 541	
" 283 353 453 545	
" 284 354 454 546	
" 285 356 469 547	
" 286 357 471 549	
" 289 358 472 552	
" 290 359 473 553	
" 291 360 478	par value.....\$552,000.00

In Witness Whereof, I, Isaac Stephenson, have hereunto set my hand and seal this 12th day of May, A. D. 1917, at Marinette, Wisconsin.

Isaac Stephenson (Seal)

Signed, sealed and delivered by Isaac Stephenson in the presence of:

N. O. Borndahl,
W. E. Black.

State of Wisconsin }
County of Marinette } ss.

Personally came before me this 12th day of May A. D. 1917, the above named Isaac Stephenson, to me known to be the person who executed the foregoing instrument, and acknowledged the same.

(Seal)

Nicholas O. Borndahl,
Notary Public, Marinette County,
Wisconsin.

My commission expires May 30, 1920.

Now Come Isaac Stephenson, J. A. Van Cleve, Horace A. J. Upham, Harry J. Brown, and severally accept the trust created by the above and foregoing instrument of trust, and do hereby acknowledge the receipt by them in their capacity as Trustees of said trust of all and singular the property therein particularly described.

In Witness Whereof, we have hereunto set our hands and seals this 12th day of May, A. D. 1917, at Marinette, Wisconsin.

Isaac Stephenson (Seal)
J. A. Van Cleve (Seal)
Horace A. J. Upham (Seal)
Harry J. Brown (Seal)

37 Signed, sealed and delivered in presence of:

N. O. Borndahl,
W. E. Black,
H. C. Hornibrook.

State of Wisconsin }
County of Marinette } ss.

Personally came before me this 12th day of May, A. D. 1917, the above named Isaac Stephenson, J. A. Van Cleve, Horace A. J. Upham, Harry J. Brown, to me known to be the persons who executed the foregoing instrument, and severally acknowledged the same.

(Seal) Nicholas O. Borndahl,
Notary Public, Marinette County,
Wisconsin.

My commission expires May 30, 1920.

Now Comes J. Earl Morgan and accepts the trust created by the above and foregoing instrument of trust.

In Witness Whereof, I have hereunto set my hand and seal this 15th day of May, A. D. 1917, at Marinette, Wis.

J. Earl Morgan (Seal)

Signed, sealed and delivered in presence of:

M. C. Hansen,
Anna Seanor,
H. C. Hornibrook.

EXHIBIT "D."

Know All Men By These Presents, That I, Isaac Stephenson, of the City and County of Marinette, in the State of Wisconsin, being in good health and of sound mind and memory, do make, publish and declare the following to be my last will and testament.

It is my chief desire by this will to insure an adequate and comfortable support for my wife during the remainder of her life and to relieve her of all the cares and uncertainties of business affairs and to provide for the distribution of my estate equally among all my children and the issue of my deceased children, such issue taking by right of representation, as I have hereinafter provided.

Item One. I do hereby revoke all former wills by me made.

Item Two. I direct that my mortal remains be buried at the family burial lot in Forest Home Cemetery, in Marinette aforesaid.

Item Three. I will and direct that as soon as may be after my decease, the expenses of my last sickness and funeral and all my just debts be paid out of my personal estate. I furthermore direct that all inheritance taxes legally assessed upon any bequest or devise herein contained shall be paid out of the corpus of my whole estate, except the inheritance taxes legally assessed upon each of the parts mentioned in Items numbered from Eleven (11) to Nineteen (19) hereof, both inclusive, which I direct shall be paid out of the corpus of each of said parts respectively.

Item Four. I give and bequeath unto my wife, Martha E. Stephenson, absolutely, all of the fuel and consumable stores and provisions which shall be in or about my dwelling house and the barn and premises connected therewith at the time of my decease; also Twenty-five Thousand Dollars (\$25,000.00), to be paid to her within one (1) year after my decease, but a sufficient portion thereof to enable her to live and maintain her household in liberal style to be advanced to her from time to time in appropriate installments, according to her needs or convenience, in the discretion of the executors of this will. This sum of Twenty-five Thousand Dollars (\$25,000.00) is intended to be in lieu of her widow's allowance during the progress of the settlement of my estate.

Item Five. I also give and bequeath unto my wife all the furniture, plate, linen, china, glass, books, prints, pictures

and other non-consumable household effects of every name and nature, of which I shall die possessed and which shall then be in use or on hand for use in connection with
39 my homestead on Riverside Avenue in the City of Marinette aforesaid, excepting my wearing apparel and personal ornaments, money and securities for money, evidences of debt and of title, accounts, vouchers and manuscripts.

I also give and bequeath unto my wife all the horses, buggies, carriages, cutters, sleighs and all barn furniture, tools, utensils and other equipment of which I shall die possessed and which shall then be in use or on hand for use in connection with the barn on my homestead premises.

I also give and devise unto my wife the use, during her widowhood, of the family residence, together with all stables and outstanding buildings situated between Riverside Avenue and Stephenson Street, the same being situated on a part of Lot Thirteen (13) of the Subdivisions of Section Six (6), in Township Thirty (30) North of Range Twenty-four (24) East, in Marinette County aforesaid, together with the land and premises as heretofore occupied and used by me in connection therewith.

I also give and bequeath unto my wife One Hundred Thousand (\$100,000.00) absolutely, to use and dispose of as she may deem best, to be paid to her without interest one (1) month after she shall have made here election, after my death, to take the provisions made her by this will and not the provisions made for her by law.

I also give and bequeath unto my wife the net annual income of one (1) of the parts into which my estate shall be divided as hereinafter provided, to be paid to her by my executors and trustees at least annually as long as she shall live, as directed in Item number Eleven (11) of this will.

It is my wish and advice that my widow elect to take the provisions I have made for her by this will in lieu of the provisions made for her by law, it being my intention that she shall not be entitled to both. But, if she should elect not to take the provisions made for her by this will, then my executors shall transfer to her out of my estate the amount of whatever she may be entitled to by law as my widow as soon as the same shall be ascertained and all the provisions of this will, other than those made for her, shall be carried out by my executors and trustees as herein provided.

Item Six. I give and bequeath absolutely my wearing ap-

parel and personal ornaments of which I shall die possessed unto my son Grant T. Stephenson, but, if he should not survive me, then unto my oldest male grandchild bearing the surname Stephenson.

Item Seven. I give and bequeath unto each of my half-
40 brothers, Thomas Stephenson and William H. Stephenson, of Marinette, Five Thousand Dollars (\$5,000.00), to be paid without interest, whenever, in the judgment of my executors, they shall deem best, if such half-brothers shall survive me.

Item Eight. I give and bequeath unto my trustees hereinafter named, the survivor of them and their successors in trust, the sum of Two Thousand Dollars (\$2,000.00) in trust, nevertheless, to apply the income thereof for perpetually keeping in good repair and condition the burial lot aforesaid and the graves, grave-stones, monuments and mausoleum thereon; also any other burial ground, with graves, grave-stones, monuments and mausoleum thereon, which burial ground shall for any cause be substituted for said burial lot and my grave removed thereto.

Item Nine. I will and direct that my executors hereinafter named lay out, improved and equip as and for a public park the following described tract of land situate in the City and County of Marinette, Wisconsin: All of the land lying between the northeasterly line of Riverside Avenue and the river side of the stone retaining wall along the Menominee River and bounded on the northwest by a continuation of the northwesterly line of the residence property of my daughter Mary Brown, continued on its course to said retaining wall and on the southeast by a continuation of the southeasterly line of the residence property of my daughter Maggie Hodgins, continued on its course to said retaining wall; and that they procure and erect in said park upon a suitable pedestal a statue of myself to cost not more than Ten Thousand Dollars (\$10,000.00) of life size, or larger, in the discretion of said executors and of bronze granite or other stone not disposed to rust, stain, crack or crumble; that they cause to be inscribed upon the pedestal of such statue my name, the time and place of my birth, my several occupations and the time of my death and such other matters connected with my life as they shall deem proper to mention; also suitable mottoes or sentiments, whether suggested by my life or sayings, or drawn from other sources, to encourage the youth of future years to proper habits of frugality, honesty, indus-

try and sobriety; and that after parking said premises and the erection thereon of such completed statue, my said executors by a suitable and sufficient deed convey said premises to the City of Marinette as trustee in trust for the public, upon condition that after the execution and delivery of such deed the Common Council of said City shall by ordinance or resolution accept the grant upon the terms, conditions and forfeitures stated in the deed, that the premises shall forever be kept up and maintained for the uses of a public park and that upon a substantial abandonment of the premises for such uses, or upon the substitution, conversion and subjection of the same to other uses, such grant shall be
41 forfeited and the premises revert to and be and become the property of my heirs and assigns, provided that my said executors shall not do any work or incur any expense in complying with the directions in this Item until they have submitted a proposition in writing to said Common Council to park said land, place thereon said statue and convey the premises to the City of Marinette as trustees for the public, for the uses and upon the terms, conditions and forfeitures hereinbefore set forth (stating them in said proposition) and not unless said Common Council shall by resolution agree to accept such grant for such uses and upon said terms, conditions and forfeitures.

If, upon submitting such proposition to such Common Council, it shall not be accepted, it may be again submitted to some subsequent Council. If, upon its second submission, the proposition be again rejected, the directions contained in this Item shall be deemed to be and to have been withdrawn and the said tract of land shall become and be treated as a part of my residuary estate.

Item Ten. All the rest, residue and remainder of my estate, real, personal and mixed and of whatsoever the same may consist and wherever the same may be, I give, devise and bequeath unto my trustees hereinafter named, the survivor of them and their successors in trust, to have and to hold the same during the continuance of the lives of my wife and my daughter Harriet Augusta Skidmore and twenty-one (21) years thereafter, in trust, nevertheless, to hold, care for and manage the same and to receive the rents, issues, income and profits thereof and to apply them to the uses and for the purposes and with the powers hereinafter provided.

I direct my trustees, after my wife shall have elected, or be deemed to have elected, whether to take the provisions made

for her by this will or those made for her by law, to divide all the rest, residue and remainder of my estate, real, personal and mixed and of whatsoever the same may consist and wheresoever the same may be, into nine (9) parts of equal value, if my wife shall survive me and shall elect to take the provisions made for her by this will. If my wife shall survive me and shall elect to take the provisions made for her by law in lieu of those made for her by this will, then I direct my said trustees to divide into eight (8) parts of equal value all my estate of every nature and kind, there first being given to my wife what she may be entitled to by law as my widow and after there shall have been deducted from my estate the property necessary to carry out and satisfy the provisions of Items numbered Two (2), Three (3), Six (6), Seven (7), Eight (8), and Nine (9) of this will.

I give my trustees full power and authority to determine what portions or interests, either divided or undivided, 42 or some divided and some undivided, of my said residuary estate shall constitute each one of the said nine (9), or eight (8) parts, as the case may be, into which they are to divide the same, and to number each part from one (1) to eight (8) or nine (9), as the case may be, hereby only specifying that after such division shall have been made, each one of said parts shall have, in the judgment of said trustees, a value that shall be equal to each of the other of said parts; and hereby further directing that when such division shall have been made by said trustees as above directed the same shall be final and conclusive as to all parties who may be or become interested therein.

Item Eleven. I direct said trustees to pay my wife annually, as long as she shall live, the net annual income from part numbered nine (9), into which my trustees shall have divided my estate as aforesaid. Upon the death of my wife, part nine (9) shall cease to exist and whatever may then remain in their hands of said part nine (9), I direct said trustees to transfer to and distribute equally among all the then existing remaining parts into which my trustees shall have divided my estate and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof and be held and dispose of the same as is herein provided for the holding and disposal of said then existing remaining parts.

Item Twelve. I direct said trustees to pay to the widow of

my son Isaac Watson Stephenson during such period of the continuance of the trust created by Item Ten (10) of this will, as she shall remain unmarried, annually, Twenty-five Hundred Dollars (\$2,500.00) out of the net annual income of said part eight (8) and upon the termination of this trust, if she be then living and shall not have remarried, to transfer to her out of the principal of said part eight (8) the sum of Sixty Thousand Dollars (\$60,000.00), or property in the opinion of said trustees of the value of Sixty Thousand Dollars (\$60,000.00); and I direct said trustees during the continuance of said trust to pay annually to the children of my said son Isaac Watson Stephenson equally the remainder of such net annual income, or themselves expend and use the same for the welfare and support of said children.

Four (4) years after my death, I direct my said trustees to commence transferring to each child of my son Isaac Watson Stephenson, provided such child shall then be thirty (30) years of age, and if not then thirty (30) years of age, then upon such child's reaching the age of thirty (30) years, its equal portion of the trust property constituting part numbered eight (8), after first reserving from said part eight (8) property of the value of Sixty Thousand Dollars (\$60,000), if the widow of my son Isaac Watson Stephenson shall still be living and shall not have remarried.

I direct such first transfer to such child to be one-quarter of what said trustees shall then estimate to be such child's equal portion of said part eight (8). I direct that eight (8) years after such first transfer said trustees transfer to such child one-third of the remainder of what said trustees shall then have in their hands of such child's equal portion of said part; and twelve (12) years after such first transfer I direct said trustees to transfer to such child one-half of the remainder of what said trustees shall then have in their hands of such child's equal portion of said part; and sixteen (16) years after such first transfer I direct said trustees to transfer to such child all the remainder that said trustees shall then have in their hands of such child's equal portion of said part eight (8).

I direct said trustees to retain the property of the value of Sixty Thousand Dollars (\$60,000.00) reserve by them as aforesaid as long as the widow of my son Isaac Watson Stephenson shall remain unmarried during the period of the trust hereby created. If at any time she shall die or remarry before the end of the trust relating to said part eight (8) the

said property of the value of Sixty Thousand Dollars (\$60,000.00) is to be mingled with the other portions of the said part eight (8) and the income and principal thereof treated thereafter as the rest of said part eight (8) and paid to and used for the welfare and support of said children of my son Isaac Watson Stephenson.

Should the net annual income of said property of the value of Sixty Thousand Dollars (\$60,000.00) while reserved by said trustees in any year exceed Twenty-five Hundred Dollars (\$2,500.00), such excess I direct said trustees to pay annually to the children of my son Isaac Watson Stephenson equally, or themselves expend and use the same for the welfare and support of said children.

Upon the death of any child of my son Isaac Watson Stephenson, I direct its surviving issue, if any, shall take and enjoy what the parent would take and enjoy, if living; and if there be no surviving issue, or if all such issue shall die, then the surviving child of my son Isaac Watson Stephenson during its life and upon its death, its surviving issue shall take and enjoy the same. Upon the termination of this trust I direct said trustees to transfer to the two (2) children of my son Isaac Watson Stephenson the balance of said part eight (8) then in the hands of my said trustees, in such portion to each so that each child of my said son Isaac Watson Stephenson shall have received its equal half of the principal and income of said part eight (8).

44 I direct that the surviving issue of each deceased child of my son Isaac Watson Stephenson take per stirpes and not per capita what its parent would have taken, if living; and if there be no such issue of such deceased child, then the surviving child of my son Isaac Watson Stephenson shall take the same; and if there be no such surviving child, then its issue, if any, shall take the same per stirpes and not per capita, subject always to the previous direction to transfer to the widow of my son Isaac Watson Stephenson property of the value of Sixty Thousand Dollars (\$60,000.00), if she shall then be entitled thereto.

If at any time prior to the termination of this trust, all the children of my son Isaac Watson Stephenson and all their issue shall have died, then said part eight (8) shall cease to exist and shall not thereafter be entitled to any additions from any other part and I direct that all of said part eight (8) then in the hands of said trustees, excepting the property of the value of Sixty Thousand Dollars (\$60,000.00) hereto-

fore reserved for the benefit of his widow, shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof and be held and disposed of the same as is herein provided for the holding and disposal of said then existing remaining parts; and if the widow of my son Isaac Watson Stephenson shall die or shall remarry before the termination of this trust, but after the death of all the children of my son Isaac Watson Stephenson and after the death of all their issue, I direct said trustees to transfer to and distribute equally among all the then existing remaining parts into which my estate shall have been divided all of said property of the value of Sixty Thousand Dollars (\$60,000.00) reserve for the benefit of the widow of my son Isaac Watson Stephenson.

Item Thirteen. I direct said trustees during the continuance of the trust created by Item Ten (10) of this will to pay annually to my grandsons, Howard Stephenson George and Isaac Stephenson George, equally, the net annual income of said part numbered seven (7), or if my said trustees shall deem best, themselves to use and expend such net annual income for the welfare and support of said grandsons last mentioned. Four (4) years after my death I direct my said trustees to commence transferring to each of my said grandsons, children of my daughter Ella J. George, his equal portion of the trust property constituting part seven (7), provided such grandson shall then be thirty (30) years of age, and if not then thirty (30) years of age, then upon such 45 grandson's reaching the age of thirty (30) years.

I direct such first transfer to such grandson to be one-quarter of what said trustees shall then estimate to be such grandson's equal portion of said part seven (7). I direct that eight (8) years after such first transfer said trustees transfer to such grandson one-third of the remainder of what said trustees shall then have in their hands of such grandson's equal portion of said part; and twelve (12) years after such first transfer I direct said trustees to transfer to such grandson one-half of the remainder of what said trustees shall then have in their hands of such grandson's equal portion of said part; and sixteen (16) years after such first transfer I direct said trustees to transfer to such grandson all the

remainder that said trustees shall then have in their hands of such grandson's equal portion of said part seven (7).

In case of the death of any such grandson mentioned in Item Thirteen (13), I direct his surviving issue, if any, shall take and enjoy what he would take and enjoy if living; and if there be no surviving issue, or if all such issue shall die, then the surviving grandson mentioned in Item Thirteen (13) during his life and upon his death, his surviving issue shall take and enjoy the same. Upon the termination of this trust, I direct said trustees to transfer to my said two (2) grandsons, children of my deceased daughter Ella J. George, the balance of said part seven (7) then in the hands of my said trustees in such portion to each, so that each said grandson shall have received his equal half of the principal and income of said part seven (7), I direct that the issue of each deceased grandson mentioned in this Item Thirteen (13) shall take per stirpes and not per capita what its parent would have taken, if living; and if there be no such issue of such deceased grandson, then the surviving grandson mentioned in this Item Thirteen (13) shall take the same; and if there be no surviving grandson, then his issue, if any, shall take the same per stirpes and not per capita.

If at any time prior to the termination of this trust, all the children of my daughter Ella J. George and all their issue shall have died, then said part seven (7) shall cease to exist and shall not thereafter be entitled to any additions from any other part and I direct that all of said part seven (7) then in the hands of said trustees, shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate and thereafter the same shall constitute a portion of said then existing remaining parts respectively the same as if originally a portion thereof and be held and disposed of the same as is herein provided for the holding and disposal of said then existing remaining parts.

46 Item Fourteen. I direct said trustees to pay to my daughter Georgianna Ludington annually the net annual income from part numbered six (6) into which my trustees shall have divided my estate as aforesaid. If my wife shall elect to take the provisions made for her by this will, I direct said trustees to transfer to my daughter Georgianna Ludington One Hundred Thousand Dollars (\$100,000.00), in money or in assets equal thereto, out of the principal of said part six (6) as soon as the time shall have arrived when it

shall be determined that my wife has made such election, last mentioned. If daughter Georgianna Ludington shall be living four (4) years after my death, I direct said trustees to transfer to her out of the principal of said part six (6) one-quarter of the principal of what they shall then have in their hands belonging to said part six (6). If my daughter Georgianna Ludington shall be living eight (8) years after my death, I direct said trustees to transfer to her one-third of the principal of what they shall then have in their hands belonging to said part six (6). If my daughter Georgianna Ludington shall be living twelve (12) years after my death, I direct said trustees to transfer to her one-half of the principal of what they shall then have in their hands belonging to said part six (6). If my daughter Georgianna Ludington shall be living sixteen (16) years after my death, I direct said trustees to transfer to her all the remainder of said part six (6) then in their hands and to transfer to her from time to time, if living, any and all further additions to said part six (6) that may be added thereto from any of the other parts.

I give, devise and bequeath to the appointee or appointees of my daughter Georgianna Ludington by her last will and testament all property of every nature and kind in the hands of my said trustees at the time of her death constituting said part six (6) and all property that shall thereafter be added to said part six (6) from any other part. If my daughter Georgianna Ludington shall die without leaving issue her surviving and without having by her last will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of her death then constituting said part six (6) and any additions thereto, then
47 said part six (6) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all of said part six (6) then in the hands of said trustees shall be transferred to and distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

In case my daughter Georgianna Ludington shall die leaving issue her surviving, and shall not by her last will and testament appoint a person or persons to receive all such property then constituting said part six (6) and all additions

thereto, then as to such portions of said part six (6) and all additions thereto as to which there is no appointee named by the last will and testament of my daughter Georgianna Ludington, I direct said trustees during the continuance of this trust to pay to the issue of my daughter Georgianna Ludington the net annual income of the same, or themselves use and expend the said net annual income for the welfare and support of such issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the issue of my daughter Georgianna Ludington all the remainder of the property then in their hands constituting said part six (6) and all additions thereto as to which there shall be no appointee in her will, such issue taking per stirpes and not per capita. But if in the case last mentioned all such issue shall die before the termination of this trust by lapse of time, then, after such issue shall die, said part six (6) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and I direct that all of said part six (6) then in the hands of said trustees shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Fifteen. I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income
48 from part numbered five (5) into which my trustees shall have divided my estate as aforesaid. If my wife shall elect to take the provisions made by her by this will, I direct said trustees to transfer to my daughter Elizabeth S. Morgan One Hundred Thousand Dollars (\$100,000.00), in money or in assets equal thereto, out of the principal of said part five (5) as soon as the time shall have arrived when it shall be determined that my wife has made such election, last mentioned. If my daughter Elizabeth S. Morgan shall be living four (4) years after my death, I direct said trustees to transfer to her out of the principal of said part five (5) one-quarter of the principal of what they shall then have in their hands belonging to said part five (5). If my daughter Elizabeth S. Morgan shall be living eight (8) years after my death, I direct said trustees to transfer to her one-third of the principal of what they shall then have in their hands belonging to said part five (5). If my daughter Elizabeth S. Morgan

shall be living twelve (12) years after my death, I direct said trustees to transfer to her one-half of the principal of what they shall then have in their hands belonging to said part five (5). If my daughter Elizabeth S. Morgan shall be living sixteen (16) years after my death, I direct said trustees to transfer to her all the remainder of said part five (5) then in their hands and to transfer to her from time to time, if living, any and all further additions to said part five (5) that may be added thereto from any of the other parts.

I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) and all property that shall thereafter be added to said part five (5) from any other part. If my daughter Elizabeth S. Morgan shall die without leaving issue her surviving and without having by her last will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of her death then constituting said part five (5) and any additions thereto, then said part five (5) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all of said part five (5) then in the hands of said trustees shall be transferred to and distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

In case my daughter Elizabeth S. Morgan shall die leaving issue her surviving, and shall not by her last will and testament appoint a person or persons to receive all such property then constituting said part five (5) and all additions
49 thereto, then as to such portions of said part five (5) and all additions thereto as to which there is no appointee named by the last will and testament of my daughter Elizabeth S. Morgan, I direct said trustees during the continuance of this trust to pay to the issue of my daughter Elizabeth S. Morgan the net annual income of the same, or themselves use and expend the said net annual income for the welfare and support of such issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the

issue of my daughter Elizabeth S. Morgan all the remainder of the property then in their hands constituting said part five (5) and all additions thereto as to which there shall be no appointee in her will, such issue taking per stirpes and not per capita. But if in the case last mentioned all such issue shall die before the termination of this trust by lapse of time, then, after such issue shall die, said part five (5) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and I direct that all of said part five (5) then in the hands of said trustees shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Sixteen. I direct said trustees to pay to my daughter Mary Brown annually the net annual income from part numbered four (4) into which my trustees shall have divided my estates as aforesaid. If my wife shall elect to take the provisions made for her by this will, I direct said trustees to transfer to my daughter Mary Brown One Hundred Thousand Dollars (\$100,000), in money or in assets equal thereto, out of the principal of said part four (4) as soon as the time shall have arrived when it shall be determined that my wife has made such election, last mentioned. If my daughter Mary Brown shall be living four (4) years after my death, I direct said trustees to transfer to her out of the principal of said part four (4) one-quarter of the principal of what they shall then have in their hands belonging to said part four (4). If my daughter Mary Brown shall be living eight (8) years after my death, I direct said trustees to transfer to her one-third of the principal of what they shall then have in their hands belonging to said part four (4). If my daughter Mary Brown shall be living twelve (12) years after my death, I direct said trustees to transfer to her one-half of the principal of what they shall then have in their hands belonging to said part four (4). If my daughter Mary Brown shall be living sixteen (16) years after my death, I direct said trustees to transfer to her all the remainder of said part four (4) then in their hands and to transfer to her from time to time, if living, any and all further additions to said part four (4) that may be added thereto from any of the other parts.

50 I give, devise and bequeath to the appointee or appointees of my daughter Mary Brown by her last will and testament all property of every nature and kind in the hands of my said trustees at the time of her death constituting said part four (4) and all property that shall thereafter be added to said part four (4) from any other part. If my daughter Mary Brown shall die without leaving issue her surviving and without having by her last will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of her death then constituting said part four (4) and any additions thereto, then said part four (4) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all of said part four (4) then in the hands of said trustees shall be transferred and distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

In case my daughter Mary Brown shall die leaving issue her surviving, and shall not by her last will and testament appoint a person or persons to receive all such property then constituting said part four (4) and all additions thereto, then as to such portions of said part four (4) and all additions thereto as to which there is no appointee named by the last will and testament of my daughter Mary Brown, I direct said trustees during the continuance of this trust to pay to the issue of my daughter Mary Brown the net annual income of the same, or themselves use and expend the said net annual income for the welfare and support of such issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the issue of my daughter Mary Brown all the remainder of the property then in their hands constituting said part four (4) and all additions thereto as to which there shall be no appointee in her will, such issue taking per stirpes and not per capita. But if in the case last mentioned all such issue shall die before the termination of this trust by lapse of time, then, after such issue shall die, said part four (4) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and I direct that all of said part four (4) then in the hands of said trustees

shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Seventeen. I direct said trustees to pay to my daughter Harriet Augusta Skidmore annually the net annual
51 income from part numbered three (3) into which my trustees shall have divided my estate as aforesaid. If my wife shall elect to take the provisions made for her by this will, I direct said trustees to transfer to my daughter Harriet Augusta Skidmore One Hundred Thousand Dollars (\$100,000.00), in money or in assets equal thereto, out of the principal of said part three (3) as soon as the time shall have arrived when it shall be determined that my wife has made such election, last mentioned. If my daughter Harriet Augusta Skidmore shall be living four (4) years after my death, I direct said trustees to transfer to her out of the principal of said part three (3) one-quarter of the principal of what they shall then have in their hands belonging to said part three (3). If my daughter Harriet Augusta Skidmore shall be living eight (8) years after my death, I direct said trustees to transfer to her one-third of the principal of what they shall then have in their hands belonging to said part three (3). If my daughter Harriet Augusta Skidmore shall be living twelve (12) years after my death, I direct said trustees to transfer to her one-half of the principal of what they shall then have in their hands belonging to said part three (3). If my daughter Harriet Augusta Skidmore shall be living sixteen (16) years after my death, I direct said trustees to transfer to her all the remainder of said part three (3) then in their hands and to transfer to her from time to time, if living, any and all further additions to said part three (3) that may be added thereto from any of the other parts.

I give, devise and bequeath to the appointee or appointees of my daughter Harriet Augusta Skidmore by her last will and testament all property of every nature and kind in the hands of my said trustees at the time of her death constituting said part three (3) and all property that shall thereafter be added to said part three (3) from any other part. If my daughter Harriet August Skidmore shall die without leaving issue her surviving and without having by her last

will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of her death then constituting said part three (3) and any additions thereto, then part three (3) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all of said part three (3) then in the hands of said trustees shall be transferred to and distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

52 In case my daughter Harriett August Skidmore shall die leaving issue her surviving, and shall not by her last will and testament appoint a person or persons to receive all such property then constituting said part three (3) and all additions thereto, then as to such portions of said part three (3) and all additions thereto as to which there is no appointee named by the last will and testament of my daughter Harriet Augusta Skidmore, I direct said trustees during the continuance of this trust to pay to the issue of my daughter Harriet Augusta Skidmore the net annual income of the same, or themselves use and expend the said net annual income for the welfare and support of such issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the issue of my daughter Harriet Augusta Skidmore all the remainder of the property then in their hands constituting said part three (3) and all additions thereto as to which there shall be no appointee in her will, such issue taking per stirpes and not per capita. But if in the case last mentioned all such issue shall die before the termination of this trust by lapse of time, then, after such issue shall die, said part three (3) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and I direct that all of said part three (3) then in the hands of said trustees shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Eighteen. I direct said trustees to pay to my daughter Maggie Hodgins annually the net annual income from part numbered two (2) into which my trustees shall have divided my estate as aforesaid. If my wife shall elect to take the provisions made for her by this will, I direct said trustees to transfer to my daughter Maggie Hodgins One Hundred Thousand Dollars (\$100,000.00); in money or in assets equal thereto, out of the principal of said part two (2) as soon as the time shall have arrived when it shall be determined that my wife has made such election, last mentioned. If my daughter Maggie Hodgins shall be living four (4) years after my death, I direct said trustees to transfer to her out of the principal of said part two (2) one-quarter of the principal of what they shall then have in their hands belonging to said part two (2). If my daughter Maggie Hodgins shall be living eight (8) years after my death, I direct said trustees to transfer to her one-third of the principal of what they shall then have in their hands belonging to said part two (2). If my daughter Maggie Hodgins shall be living twelve (12) years after my death, I direct said trustees to transfer to her one-half of the principal of what they shall then have in their hands belonging to said part two (2). If my daughter Maggie Hodgins shall be living sixteen (16) years after my death, I direct said trustees to transfer to her all the remainder of said part two (2) then in their hands and to transfer to her from time 53 to time, if living, any and all further additions to said part two (2) that may be added thereto from any of the other parts.

If my daughter Maggie Hodgins shall die without issue her surviving, I give, devise and bequeath to the appointee or appointees of my daughter Maggie Hodgins by her last will and testament all property of every nature and kind in the hands of my said trustees at the time of her death constituting said part two (2) and all property that shall thereafter be added to said part two (2) from any other part. If my daughter Maggie Hodgins shall die without leaving issue her surviving and without having by her last will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of her death then constituting said part two (2) and any additions thereto, then said part two (2) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and all of said part two (2) then in the hands of said trustees shall be transferred to and

distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

In case my daughter Maggie Hodgins shall die leaving issue her surviving, I direct said trustees during the continuance of this trust to pay to the issue of my daughter Maggie Hodgins the net annual income of part two (2), or themselves use and expend the said net annual income for the welfare and support of such issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the issue of my daughter Maggie Hodgins all the remainder of the property then in their hands constituting said part two (2) and all additions thereto, such issue taking per stirpes and not per capita. But if in the case last mentioned all such issue shall die before the termination of this trust by lapse of time, then, after such issue shall die, said part two (2) shall cease to exist and shall not thereafter be entitled to any additions from any other part, and I direct that all of said part two (2) then in the hands of said trustees shall be transferred to and distributed equally among all the then existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Nineteen. I direct said trustees to pay to my son Grant T. Stephenson annually the net annual income from part numbered one (1) into which my trustee shall have
54 divided my estate as aforesaid. If my wife shall elect to take the provisions made for her by this will, I direct said trustees to transfer to my son Grant T. Stephenson One Hundred Thousand Dollars (\$100,000.00), in money or in assets equal thereto, out of the principal of said part one (1) as soon as the time shall have arrived when it shall be determined that my wife has made such election, last mentioned. If my son Grant T. Stephenson shall be living four (4) years after my death, I direct said trustees to transfer to him out of the principal of said part one (1) one-quarter of the principal of what they shall then have in their hands belonging to said part one (1). If my son Grant T. Stephenson shall be living eight (8) years after my death, I direct said trustees to transfer to him

one-third of the principal of what they shall then have in their hands belonging to said part one (1). If my son Grant T. Stephenson shall be living twelve (12) years after my death, I direct said trustees to transfer to him one-half of the principal of what they shall then have in their hands belonging to said part one (1). If my son Grant T. Stephenson shall be living sixteen (16) years after my death, I direct said trustees to transfer to him all the remainder of said part one (1) then in their hands and to transfer to him from time to time, if living, any and all further additions to said part one (1) that may be added thereto from any of the other parts.

If my son Grant T. Stephenson shall die before said trustees shall have transferred all the property constituting said part one (1) and shall leave surviving Irene Eldred Stephenson his widow, I direct said trustees to reserve from part one (1) enough property, as far as possible, to equal a fund of Sixty Thousand Dollars (\$60,000.00) and to pay annually the net annual income thereof to said Irene Eldred Stephenson as the widow of my son Grant T. Stephenson during such portion of the unexpired term of this trust as she shall live and not remarry; and upon the termination of this trust by lapse of time, to transfer to her, if she shall survive and shall not have remarried, all the principal of said fund reserved for her by this Item Nineteen (19) of my will.

In case there shall not be in said part one (1) sufficient property to enable the trustees to reserve a fund of Sixty Thousand Dollars (\$60,000.00) at the time of the death of my son Grant T. Stephenson, said trustees shall in all cases, anything herein to the contrary, notwithstanding, add to said fund from any and all additions that may come to said part one (1) from any other part, enough to make said fund equal Sixty Thousand Dollars (\$60,000.00).

During the term of this trust and so long as said Irene Eldred Stephenson lives and remains unmarried, said fund reserved for her as aforesaid as his widow shall be kept for the sole purpose hereinbefore set forth and shall be ex-
55 cepted from all the remaining provisions of this Item Nineteen (19) and shall be considered as excluded whenever mention is hereafter made in this Item of said part one (1) or the property constituting said part one (1).

If such widow of my son Grant T. Stephenson shall die or remarry before the termination of this trust, then from and after the date of her death or remarriage, I direct said trustees to dispose of the principal and income of all of said fund

then in their hands so reserved for her to the person or persons who would have been entitled thereto at the time of her death or remarriage, if my son Grant T. Stephenson had died as aforesaid and had left no widow.

If my son Grant T. Stephenson shall die without leaving issue him surviving, I give, devise and bequeath to the appointee or appointees of my son Grant T. Stephenson by his last will and testament all the property of every nature and kind in the hands of my said trustees at the time of his death constituting said part one (1) and all property that shall thereafter be added to said part one (1) from any other part.

If my son Grant T. Stephenson shall die without leaving issue him surviving and without having by his last will and testament appointed a person or persons to receive all the property in the hands of said trustees at the time of his death then constituting said part one (1) and any additions thereto, then said part one (1) shall cease to exist and shall not thereafter be entitled to any additions from any other part; and all of said part one (1) then in the hands of said trustees shall be transferred to and distributed equally among all the existing remaining parts into which my trustees shall have divided my estate, and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a part thereof, and be held and disposed of as is herein provided for the holding and disposal of the said then existing remaining parts.

In case my son Grant T. Stephenson shall die leaving issue him surviving, I direct said trustees during the continuance of this trust to pay to the issue of my son Grant T. Stephenson the net annual income of part one (1), or themselves use and expend the net annual income of the same for the welfare and support of said issue, and upon the termination of this trust by lapse of time, I give, devise and bequeath to the issue of my son Grant T. Stephenson all the remainder of said property then in their hands constituting said part one (1) and all additions thereto, such issue taking per stirpes and not per capita.

But if in the case of my son Grant T. Stephenson's dying and leaving issue him surviving, all such issue shall die before the termination of this trust by lapse of time, then after
56 such issue shall die, said part one (1) shall cease to exist and shall not be entitled thereafter to any additions from any other part; and I direct that all of said part one (1) then in the hands of said trustees shall be transferred to and dis-

tributed equally among all the then existing remaining parts into which my trustees have divided my estate and thereafter the same shall constitute a portion of said then existing remaining parts, respectively, the same as if originally a portion thereof, to be held and disposed of accordingly.

Item Twenty. I will and direct that prior to the division of my residuary estate into equal parts as hereinabove directed, the net income thereof from the date of my death shall be ascertained by my executors and trustees as soon as and as often as practicable and I direct my executors and trustees to pay to the beneficiaries under the Items numbered from Eleven (11) to Nineteen (19), both inclusive, of this will, from time to time, out of such income and when and as collected sums of money equal to their respective interests in the net income of my estate as set forth by said Items numbered from Eleven (11) to Nineteen (19), both inclusive and upon the same terms and conditions as are set forth, respectively, in said Items numbered from Eleven (11) to Nineteen (19), both inclusive and the other provisions of my will relating to and modifying said Items.

The said executors and trustees are to make such payments of income the same as if my estate had been actually divided at the time of my death; hereby authorizing said executors and trustees to make advances or payments on account of such income to said beneficiaries from time to time and to adjust, determine and pay the balance when such division of my estate shall have been actually made and the income actually collected, provided the portions thus advanced or paid shall not exceed in the aggregate the interests of such beneficiary in such income and in the case of each infant beneficiary said executors prior to the division of my estate into parts are authorized to use and expend for the welfare and support of such infant such portions of the infant's share as said executors shall deem necessary and the balance to pay to said trustees who shall hold, use and dispose of the balance of said income so received the same as they are directed to dispose of said infant's portion of the income of any of the several parts into which my estate shall have been divided; it being my will that such division as far as possible, shall take effect by relation as of the time of my death, subject to the exigencies of the administration of my estate and the preliminary things to be done to fully carry out the provisions of this will.

Item Twenty-One. In every case where at the time of my death I shall hold any unpaid note or other obligation of any

of my issue, I direct my trustees in dividing my estate into
57 equal parts as aforesaid to assign the unpaid note or
obligation of any such issue to the particular part of my
estate in which such issue is primarily interested under the
trust provisions hereof.

Item Twenty-Two. It is my will that the survivors and survivor and successors in trust of my said executors and trustees and such of them as shall act under this will; shall, respectively, use and enjoy all the powers, duties, privileges, rights, exemptions and the right to use his or their discretion in certain matters that are specifically given to said executors and trustees respectively named in this will, the same as if the words "the survivors and survivor of them, their successors or successor in trust, and such of them as shall act under this will" had been inserted in this will next after the word "executors" and next after the word "trustees" in every instance where such words are used in this will.

Item Twenty-Three. Whereas I have heretofore provided for the division of the rest, residue and remainder of my estate into eight (8), or nine (9), equal parts as hereinbefore set forth, it is my will in case my wife shall not survive me, that all the provisions made for her in this will shall lapse and that such division shall be made into eight (8) parts only.

In case all my issue mentioned in any one or more of the items numbered from Twelve (12) to Nineteen (19), both inclusive, respectively, shall die before my death, it is my will that the bequests in each such item shall lapse where my issue shall so fail to survive me and the number of equal parts into which I have directed my estate to be divided shall be decreased accordingly; and the amount of part numbered nine (9), in case my wife shall survive me, and the amounts of such remaining parts mentioned in the items where my issue named therein shall survive me shall be increased equally accordingly; excepting, however, the provisions made for the widow of my son Isaac Watson Stephenson in Item numbered Twelve (12) of this will and those for Irene Eldred Stephenson in Item numbered Nineteen (19) of this will, which I direct shall be carried out notwithstanding the death of all my issue mentioned in said Items numbered Twelve (12) and Nineteen (19), respectively, before my decease.

Item Twenty-Four. In case any property embraced in any of the trust provisions of this will shall be under the jurisdiction of a state or country the laws of which do not permit a trust thereof to continue as long as hereinbefore provided,

then I direct that such trust as to such property shall terminate upon the death of the person or the survivor of the persons during whose life or lives my trustees are hereinbefore authorized and directed to hold said property in trust; whereupon my said trustees are directed to transfer all such property then remaining under the jurisdiction of such other state or country to the person or persons then entitled to the income thereof, in the same proportion to each as
58 such person is then entitled to enjoy the income thereof.

In every case in this will where an infant shall be entitled to the receipt of income, I authorize and empower my executors and also my trustees to accumulate during the minority of such infant so much of its share of net annual income as my said executors or trustees, as the case may be, may deem unnecessary to expend for its welfare and support, and to pay all such accumulations to such infant at the expiration of its minority, or at the expiration of the trust, if such trust shall sooner terminate.

In every case where an infant shall be entitled to the receipt of principal, unless otherwise specially provided in this will, I authorize and empower my said trustees to withhold the transfer of said principal until said infant shall have reached the age of thirty (30) years, if the trust shall last so long; if the trust shall sooner terminate, then to withhold such principal until the termination thereof.

Item Twenty-Five. In every case in this will where said trustees are required to transfer to any person any portion of the property then held in trust, said trustees are authorized and empowered in their discretion to select such property for transfer as they may see fit and transfer the whole or any undivided interest therein to such person as they may deem best, provided only the property, or the interest therein so transferred, is in the opinion of said trustees equivalent in value to what they are required to transfer to such person as aforesaid.

In every case in this will where trustees are required to pay annually to any person any net annual income or portion thereof, said trustees may in their discretion make payment to such person oftener and on account of such net annual income and as and when collected and when such net annual income for any year shall have been definitely determined, adjust and determine the balance due such person and pay the same.

In case of the death of any person entitled to any income

under this will, there shall be paid to the estate of such person, or to his or her heirs, as said executors and trustees shall determine, whatever said trustees shall determine to be equitably due out of the net annual income of the trust fund in which said person shall be interested from the end of the last year in which said income has been determined up to the time of such person's death.

Item Twenty-Six. I authorize and empower my said trustees and direct said trustees that whenever in their judgment there shall be danger that any portion or portions in my residuary estate coming to any beneficiary under this will, whether of income or corpus, as hereinbefore provided, will be dissipated or improvidently handled through intemperance or spendthrift habits, lack of business capacity, or subjection to or for any other reason or reasons, in said trustees' discretion, whether like unto those above enumerated or otherwise, to withhold from every such beneficiary under this will the whole or any and each portion of my estate coming to such beneficiary as unworthy to receive the same, all in the discretion of said trustees and to pay and transfer to every such beneficiary only so much of the portion of my estate, whether of income or corpus, otherwise coming to such beneficiary, as my said trustees shall deem advisable; and in case my said trustees shall deem it best, instead of paying and transferring to any such unworthy beneficiary or beneficiaries any portion of my estate, whether of income or corpus, themselves to expend the same or any portion thereof for the benefit or support of such unworthy beneficiary or beneficiaries, then I hereby authorize and empower my said trustees so to do.

Whatever shall have been once withheld as above provided from any such unworthy beneficiary under my will and shall not have been expended by said trustees for the benefit and support of such unworthy beneficiary, shall be paid and transferred by said trustees to such other worthy beneficiaries under my will who would have been entitled thereto in case such unworthy beneficiary had died.

Whenever and while in the judgment of my said trustees the reason or reasons for withholding the portion or portions thereof of any beneficiary, as above provided, shall have ceased to exist, then during such cessation I authorize and empower my said trustees to convey, transfer, pay over and deliver to such beneficiary any portion or portions of my estate that shall thereafter be coming to such beneficiary

under any of the provisions of this will, or to expend the same for the benefit or support of such beneficiary.

Item Twenty-Seven. I hereby nominate and appoint my friends, John A. Van Cleave of Marinette, Wisconsin, and Horace A. J. Upham of Milwaukee, Wisconsin, my sons-in-law, Harry J. Brown and J. Earl Morgan and my son, Grant T. Stephenson, executors of this will and trustees of the several trusts therein set forth and I direct that no bond or other security of any kind be required of them, or any of them, as necessary to their qualifying and entering upon their duties as executors or as trustees under this will.

I direct that my said executors and trustees shall be allowed a reasonable compensation for their services as such and shall also be allowed all their reasonable and proper expenses incurred in the administration, care and management of my estate, including a reasonable compensation to all agents and attorneys which they may find it necessary to employ to aid in the administration, care and management of said estate.

And whereas I have appointed the same persons to be
60 executors and trustees under this will, I hereby authorize and empower them to hold said offices at the same time, and to exercise the powers and discharge the duties relating to the office of trustee as well while they are holding the said office of executor as after they may be discharged from said office of executor.

Item Twenty-Eight. I give unto my said executors and trustees, respectively, full power to sell and convey and also to lease and mortgage my real estate and any and every part thereof, including any and all real estate acquired by them upon such terms and conditions and for such prices and for such periods of time, for cash or deferred payments, or partly both, and either at public or private sale, and to accept such securities and other property in payment thereof, as said executors and trustees, respectively, may deem best. I also give them full power to collect and receive the rents, profits and issues of my estate, real and personal, committed to their care and all money and property coming from the leasing, mortgaging or other disposal of any and every portion thereof; also to build, rebuild upon and otherwise improve such real estate and any and every portion thereof, and to repair and otherwise improve any building thereupon, as they shall deem best, likewise to improve and build upon any real estate acquired by them, to repair, rebuild and other-

wise improve any buildings thereon; also to sell, negotiate, exchange, hypothecate and pledge any personal property, not specifically bequeathed, left by me or thereafter acquired by them, as they shall deem best; also to invest, re-invest and keep invested all moneys that shall come in any way into their hands and not otherwise directed to be disposed of by my said will and to change from time to time all such investments, converting realty into personalty and personalty into realty, as they shall deem best and to collect and receive the principal as well as the income of all such investments and other property coming into their hands, with authority to make investments in real estate by purchase or otherwise and in the stock, notes, bonds or other obligations of corporations, either private, public or municipal, associations, trusts and individuals and whether or not such stock, notes, bonds or other obligations be secured or unsecured, as they shall deem best. Also with full authority to execute all deeds, mortgages, leases, releases, assignments, declarations, contracts, notes, bonds and other written instruments necessary, suitable or convenient, as they shall deem best to carry out the provisions of this will. Also with full authority to compromise, compound and otherwise settle any claim or claims whatsoever due to my estate or made against it by anyone whomsoever and whether any such claim is capable of being enforced in any court or not, all in such manner as my said executors and trustees shall deem best; also with authority to submit to arbitrators selected as my said executors or trustees may deem best any matter or controversy concerning my estate and to carry out the decision of such arbitrators and to appeal therefrom; also with authority

61 to extend the time of payment of any and every indebtedness due me at the time of my decease from time to time as they see fit; and I direct that they shall not be held liable in case of the loss of any such part or portion thereof by reason of any such extensions. I further declare that my said executors and trustees are not expected to convert my stocks, bonds, notes, mortgages and other securities into cash, or to enforce the collection of any loans made by me, unless my said executors or trustees deem it best so to do; and I direct that they and no one of them be held individually liable for any depreciation after my death in value of any part of my estate, however or whenever acquired, or for any loss thereto, in case they shall deem it best not to convert any of

my estate into cash or not to enforce the collection of any loans made by me or by them.

By the giving of the powers enumerated in this Item, I do not mean or intend to revoke, limit or modify any specific devise, bequest or direction contained in this will.

Item Twenty-Nine. I hereby fully authorize and empower said executors and trustees as such and in either of said capacities, to deal with and make contracts and agreements with and in regard to and loan money to, with or without security, and take additional stock or interest in any corporation, syndicate, trust, partnership, association or other concern in which my estate may be interested, either as a stockholder, owner, creditor, contributor, or otherwise and notwithstanding the fact that my said executors and trustees, or some one or more of them, may also have a personal or representative interest in such corporation, syndicate, trust, partnership, association or other concern, or be a director or directors, trustee or trustees, agent or agents, or an officer or officers thereof; such contracts, agreements, loans and subscriptions for additional stock or interest to be upon such terms and conditions and for such length of time and at such rate of interest as my said executors or trustees shall deem best; the authority and powers of my said executors and trustees with reference to such contracts, agreements, loans and subscriptions for additional stock or interest to be as full, extensive and complete as those which I would possess and could exercise in respect thereto, if living.

And I fully authorize my executors and trustees and each of them to make contracts with any other person, agent, trustee or officer, or stockholder or shareholder of any such corporation syndicate, trust, partnership, association or other concern, as I could do if living, in regard to any of the affairs thereof.

All that I require of my said executors and trustees in the premises is to act honestly and in good faith and if they so act, they shall not in any way or manner, or to any extent be liable to my estate or to any beneficiary thereof for
62 any loss or damage that may arise from or grow out of their said acts.

Item Thirty. I hereby fully authorize and empower my said executors and trustees, in either of said capacities, to organize or cause to be organized, a corporation or corporations under the laws of the state of Wisconsin and for any of the purposes speci-

fied in any such laws and also under the laws of any of the states or territories of the United States and for any of the purposes specified in any such laws and also to join with any other person or persons in the organization of any such corporation and also to subscribe for and take stock in such corporation and to pay over or transfer to any such corporation or corporations any money or property belonging to my estate of the stock of any such corporation or corporations.

Item Thirty-One. In case of the receipt by my trustees and also in a case of the receipt by my executors from any corporation, partnership, syndicate, trust, association or any other concern of any dividend or distribution of money or property, I direct and empower my trustees and executors so receiving the same, as the case may be, to examine into the source of such money or property, or both, so received and to determine whether the same has been derived from earnings made by such corporation, partnership, syndicate, trust, association or other concern, after my death, or has been derived from its capital assets, including surplus and undivided profits possessed by it at the time of my death. So much of every such dividend or distribution as my trustees or executors shall determine to have been derived from earnings made after my death shall be distributed among the beneficiaries of my will as income, and so much thereof as my trustees or executors shall determine to have been derived from such capital assets, surplus and undivided profits shall be retained by my trustees and executors a corpus or principal of my estate. I direct that the decision of my trustees and executors in either capacity in determining how much of every dividend or distribution of money and property as aforesaid shall be considered as income and how much thereof shall be considered as corpus, shall be final and conclusive.

Item Thirty-Two. Whereas I now own a controlling interest in the N. Ludington Company, I suggest, but do not command, that so long as my estate holds stock in said corporation, it would be wise in my judgment to retain a controlling interest.

Item Thirty-Three. I will and direct that all taxes, general and special, all expenses, all disbursements for fees and services of executors and their attorneys, agents and employees, and all other necessary and proper expenditures and disbursements, relating to the administration and settlement of
63 my estate, whether like those above enumerated or different therefrom for which my estate shall be liable be-

fore the entry of a decree assigning my residuary estate to my trustees and the discharge of my executors as such, shall be paid out of the corpus of my estate.

I will and direct that all taxes, general and special, all expenses of administration, all disbursements for fees and services of the trustees and of their attorneys, agents and employees, all disbursements for abstracts of title, all premiums for insurance, the cost of all repairs to property and all other necessary and proper expenditures and disbursements relating to said trust estate and the administration of said trust by said trustees, whether like those above enumerated or different therefrom, shall be paid out of the income of my estate, so far as said income will pay the same, and that the rents, issues and profits of real estate shall be first used in making such payments. In case of any extraordinary repairs to any property of said trust estate, I authorize my trustees to distribute the same over a series of years, as they shall deem best, so as not to diminish too much the income of my estate or any part thereof in any one (1) year.

Item Thirty-Four. I exempt each of my said executors and trustees from liability for the acts of the others, and direct that he shall be held liable only for losses occurring through his own willful misconduct. This exemption shall extend and apply to all trustees and executors nominated under the power hereinafter contained.

Item Thirty-Five. I empower such of the executors and trustees named in this will as shall qualify and act under this will and such of the executors and trustees of my will as shall hereafter be appointed and as shall qualify and act under this will and the survivors and survivor of them, to nominate in writing any person or persons to supply the place of any executor or executors, trustee or trustees of my will who shall die, whether in my lifetime or after my decease, or shall resign such trust, or be removed from such trust or disclaim or be unwilling or unable to act, and which nomination or nominations shall be submitted to the court having jurisdiction of my will and estate for confirmation and appointment, and which power to nominate shall be exercised as often as need be in order to secure the confirmation and appointment of the full complement of executors and trustees under this will, and upon every such appointment my estate shall fully vest in the new and old executors, or in the new executors solely, and in the new and old trustees or in the new trustees solely, as the case may be. And I declare that the powers

and discretions hereinbefore given to and invested in the executors named shall be exercisable by the executors or executor for the time being of my will, and likewise that the powers and discretions hereinbefore invested in the trustees named shall be exercisable by the trustees or trustee for the time being of my will.

64 Item Thirty-Six. In case of the insolvency of any of my executors or trustees herein named, or of any of his or their successor or successors, I direct the court having jurisdiction of my will and estate to remove from office every such insolvent executor or trustee. I authorize such court to require at any time every executor and trustee of my will to give a suitable bond for the faithful performance of his duties as such executor and trustee, if for any reason at any time said court shall deem best.

Item Thirty-Seven. The total amount of money that I authorize my executors to expend for all purposes in the matter of Item numbered Nine (9) of this will is Fifteen Thousand Dollars (\$15,000.00) and in case my executors have not fully completed all the duties entrusted to them by said Item numbered Nine (9) within one (1) year after their appointment, then I authorize my trustees to complete what said executors have not done, and I authorize said executors to turn over to my trustees all funds, papers and contracts relating to the matters in said Item numbered Nine (9) and I hereby give to my said trustees the same powers, directions and discretions I have given to my said executors in relation thereto; and if there shall be any balance left of said Fifteen Thousand Dollars (\$15,000.00), I direct that it shall be equally distributed among all the parts into which I have directed my estate to be divided.

Item Thirty-Eight. I direct that my executors and trustees, during the settlement of my estate and as long as my trustees shall have in their hands any property to administer under the trust provisions of my will, employ Miss Mary F. Stringham to render such assistance as she may be able and pay her an annual compensation of not less than Two Thousand Dollars (\$2,000.00). I mean my present secretary.

Item Thirty-Nine. In case my wife shall elect to take the provisions made for her by law instead of those made for her by my will, then I direct my trustees to postpone until after the death of my wife and until the final settlement of her estate the transfer of the portions of the principal of the parts numbered eight (8), seven (7), six (6), five (5),

four (4), three (3), two (2) and one (1) of my estate hereinbefore directed to be made sixteen (16) years, twelve (12) years and eight (8) years after the certain times mentioned in Items numbered from Twelve (12) to Nineteen (19) both inclusive, of this will: and if any one of my children or the issue of such child, or both such child and its issue, shall have received or shall be entitled to receive from my wife, or from her estate, whether she die testate or intestate, any property or thing of value, by gift, or transfer otherwise than for a consideration equivalent to the fair value thereof, or by will or intestacy, whereby there shall have been given, transferred, bequeathed, devised or transferred by operation of law, more in value to any one of my children, or to the issue of such child, or both such child and its issue, than 65 shall have been given, transferred, bequeathed, devised or transferred by operation of law to each of the other of my children or the issue of such child, or to both such child and its issue, then I direct my trustees before transferring any portion of the corpus of my estate to any one of my children, or to the issue of such child, to re-apportion among all the then existing remaining parts numbered from one (1) to eight (8), both inclusive, into which my residuary estate shall have been divided, the remainder of the property then in their hands constituting the aforesaid parts numbered from one (1) to eight (8), both inclusive, taking into consideration all such gifts, transfers, bequests and devises by my wife and inheritances from her to any of my children, or the issue of such child, or both, and also any portions of the principal of the aforesaid parts that may have been theretofore transferred by my trustees to any one of my children or to the issue of such child or to both otherwise than pursuant to any appointment under the will of any of my children, so that the aggregate amount theretofore received and thereafter to be received by each one of my children and its issue from my said trustees out of the corpus of my estate, otherwise than by appointment as aforesaid, together with what each such child and its issue shall have received or will thereafter receive from my wife or her estate as aforesaid (computing the value of every future or limited estate, income, interest or annuity, in the manner provided by law for determining the value thereof for the assessment of inheritance taxes) shall be as nearly equal in value as possible or as said trustees can make it by re-apportionment as aforesaid; meaning and intending hereby that such re-apportionment

shall be made by my trustees prior to any transfer of principal hereinbefore directed to be made four (4), eight (8), twelve (12) and sixteen (16) years after my death, if prior to any such transfer by my trustees any of my children or the issue of such child or both shall have received or shall be entitled to receive from my wife or from her estate as aforesaid more than any other of my children or the issue of such child or both shall have received or be entitled to receive from her or her estate as aforesaid; provided that my trustees in making any such re-apportionment shall disregard any property or thing of value received or to be received by any of my children or the issue of such child out of the separate property and estate owned and possessed by my wife in her own right prior to my death, and further provided that the two (2) funds of Sixty Thousand Dollars (\$60,000.00) each to be reserved for the widow of my son Isaac Watson Stephenson and for my daughter-in-law Irene Eldred Stephenson shall each be taken into account as being given to the children of my son Isaac Watson Stephenson and to my son Grant T. Stephenson, respectively.

Item Forty. I direct that the word "issue" wherever used in this will shall be construed to mean all lawful descendants to the remotest degree, such descendants to be determined according to the laws of Wisconsin and to be limited to the heirs of the body of the ancestor named.

66 I direct that in all cases the decision of the majority of my executors and the decision of the majority of my trustees, respectively, shall be taken as the decision of and be binding upon all my executors and trustees and the doing of any act in pursuance of the decision of and by the majority of my said executors and trustees, respectively, shall be of the same force and effect as if said act was done by all of said executors or trustees.

In case any portion of this will shall be held for any reason invalid, or shall for any other reason fail, I direct that the balance of the will shall be carried out the same as if such invalid portion or the portion so failing had been omitted.

In Witness Whereof, I have hereunto set my hand and seal at Marinette, Wisconsin, the Fifteenth day of June, in the year Nineteen Hundred and Sixteen (1916).

Isaac Stephenson (seal)
(1)

The foregoing instrument, written upon fifty-eight (58) sheets of paper, was, at the date thereof, signed, sealed, pub-

lished and declared by Isaac Stephenson, the testator, to be his last will and testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto. The said Isaac Stephenson was, at the time of executing said will, of sound mind and memory and not under any restraint to the knowledge, information or belief of any of us.

Henry C. Hornibrook, residing at Marinette, Wis.

Oscar P. Osthelder, residing at Marinette, Wis.

Fred C. Burke, residing at Marinette, Wis.

67 Know All Men By These Presents, That I, Isaac Stephenson, of the City and County of Marinette and State of Wisconsin, being in good health and of sound mind and memory do make, publish and declare the following to be a codicil to my last will and testament, which is dated the fifteenth day of June in the year Nineteen Hundred and Sixteen (1916).

First. I direct and declare that each and every gift, legacy, devise or provision in my said will whereby any money, income or property is given to or for the benefit of any person or persons, is subject to the following express condition, that is to say, that the person or persons to whom, or in the cases of trusts, for whose benefit such money, income or property is given, or who is directly or indirectly benefited by any of its provisions, shall not in any manner contest, or cause to be contested, or aid in contesting or in any manner oppose the probate of my said will or this codicil thereto, or assert in any manner, direct or indirect, before any judicial tribunal, that the same is not my last will and testament and codicil thereto, or deny or call in question before any judicial tribunal the legal validity of any of the dispositions or provisions therein contained and in case any person or persons to whom, or in the cases of trusts, for whose benefit any such money, income or property is by this will given, shall in any manner contest, or cause to be contested, or aid in contesting or in any manner oppose the probate thereof or this codicil thereto, or assert in any manner, direct or indirect, before any judicial tribunal that the same is not my last will and testament and codicil thereto, or deny or call in question before any judicial tribunal the legal validity of any of the dispositions or provisions therein contained, then in such case and in every such case, I direct that such person or persons shall be paid the sum of One Dollar (\$1.00) in

lieu of all other provisions made in this will for his or her benefit and the money, income or property which is by any provision of this will destined to or for the benefit of such person or persons and any estate, share or interest in any property, real or personal, left by me at my death, or in any estate or effects to which any such person or persons, as last aforesaid, might be or become entitled as my heir or heirs or next of kin, or otherwise, excepting, however, said last mentioned sum of One Dollar (\$1.00), shall thereupon go to and in such event, I hereby give, devise and bequeath the same to the City of Marinette, Wisconsin, in trust, for the establishment and maintenance of public parks and for the maintenance of the public library heretofore given by me to said City. In the event the said City shall decline to accept the same, then, in such event, I give, devise and bequeath the same to such of my children named in my said will, then living, and the issue, then living, of such as may have before died, leaving issue, and who shall not have contested, or caused to be contested, or aided in contesting my said will or opposed the probate thereof or this codicil thereto, or assert in any manner, direct or indirect, before any judicial tribunal, that the same is not my last will and testament 68 and codicil thereto, or denied or called in question, as aforesaid, the legal validity of any of said dispositions or provisions, share and share alike, per stirpes and not per capita, the issue of any deceased child to take the share that the parent would have taken, if living.

Second. I direct that my said will be read and construed with this codicil thereto the same as if the provisions herein contained had been originally written in said will and as so written, I do hereby re-affirm and republish the same as my last will and testament.

In Witness Whereof, I have hereunto set my hand and seal at Marinette, Wisconsin, this 21st day of June, in the year Nineteen Hundred and Sixteen (1916).

Isaac Stephenson (Seal).

The foregoing instrument, written upon three (3) sheets of paper, was, at the date thereof, signed, sealed, published and declared by Isaac Stephenson, the testator, to be a codicil to the last will and testament, dated June fifteenth, Nineteen Hundred and Sixteen (1916), in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto. The said Isaac Stephenson was, at the time

of executing said codicil, of sound mind and memory and not under any restraint to the knowledge, information or belief of any of us.

Henry C. Hornibrook, residing at Marinette, Wis.

Oscar P. Osthelder, residing at Marinette, Wis.

Fred C. Burke, residing at Marinette, Wis.

69 Know All Men by These Presents, That I, Isaac Stephenson, of the City and County of Marinette and State of Wisconsin, being in good health and of sound mind and memory, do make, publish and declare this to be the second codicil to my last will and testament, which will is dated the 15th day of June in the year 1916, and the first codicil to which is dated the 21st day of June, 1916.

First. It is my will that the number of the executors of my will be four, and that the number of the trustees to carry out the trust thereof be four.

Second. I direct that Item Twenty-seven (27) of my will be changed by striking out therefrom the words: "and my son Grant T. Stephenson," as it is my will not to nominate and appoint him one of the executors of my will and one of the trustees of the several trusts contained in the said will.

Third. My said will as modified by said first codicil thereto and as further modified by this second codicil, I do hereby reaffirm and republish as my last will and testament.

In Witness Whereof, I have hereunto set my hand and seal to this second codicil to my will at Marinette, Wisconsin, this 16th day of January, in the year Nineteen Hundred and Seventeen (1917).

Isaac Stephenson. (L. S.)

The foregoing instrument which, with this attestation clause, consists of one sheet of paper, was at the date thereof signed, sealed, published and declared by Isaac Stephenson, the testator, to be a second codicil to his last will and testament, which will is dated June 15th, 1916, and the first codicil to which is dated June 21st, 1916, in the presence of us who, at this request, and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto. The said Isaac Stephenson was at the time of executing said codicil of sound mind and memory and not under any restraint, to the knowledge, information or belief of any of us:

O. P. Osthelder, residing at Marinette, Wis.

Henry C. Hornibrook, residing at Marinette, Wis.

F. C. Burke, residing at Marinette, Wis.

70 Know All Men by These Presents, That I, Isaac Stephenson, of the City and County of Marinette and State of Wisconsin, being in good health and of sound mind and memory, do make, publish and declare this to be the third codicil to my last will and testament, which will is dated the 15th day of June in the year 1916, and the first codicil to which is dated the 21st day of June, 1916, and the second codicil to which is dated the 16th day of January, 1917.

First. It is my will that the number of the executors of my will be five (5), and that the number of the trustees to carry out the trusts thereof, be five (5); and that my son, Grant T. Stephenson, shall be one of the executors of my will and one of the trustees of the several trusts contained in said will; and I hereby revoke the First and Second Items of the second codicil of my will, which second codicil is dated the 16th day of January, 1917.

Second. It is my will that Item Twenty-nine of my will, bearing date June 15th, 1916, be and hereby the same is modified by striking therefrom the words "and each of them," following the words "And I fully authorize my executors and trustees," so that said sentence shall read as follows:

"And I fully authorize my executors and trustees to make contracts with any other person, agent, trustee, or officer, or stockholder, or shareholder of any such corporation, syndicate, trust, partnership, association or other concern, as I could do, if living in regard to any of the affairs thereof."

In Witness Whereof, I have hereunto set my hand and seal to this third codicil to my will at Marinette, Wisconsin, this 15th day of May, in the year Nineteen Hundred and Seventeen, (1917).

Isaac Stephenson. (L. S.)

The foregoing instrument which, with this attestation clause, consists of two sheets of paper, was, at the date thereof, signed, sealed, published and declared by Isaac Stephenson, the testator, to be a third codicil to his last will and testament, which will is dated June 15th, 1916, and the first codicil to which is dated June 21st, 1916, and the second codicil to which is dated January 16th, 1917, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto. The said Isaac Stephenson was, at the time of executing said codicil, of sound mind and memory and not

under any restraint, to the knowledge, information or belief of any of us.

Henry C. Hornibrook, residing at Marinette, Wis.
Nicholas O. Borndahl, residing at Marinette, Wis.

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

ANSWER.

Filed Mar. 16, 1936.

The Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Denies so much of paragraph III of the petition as alleges that the deficiency asserted is in the amount of the tax in controversy, and admits the remaining allegations contained in said paragraph III.

IV. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph IV of the petition.

V. (a) and (b) Denies the allegations contained in subdivisions (a) and (b) of paragraph V of the petition.

(c) Admits so much of subdivision (c) of paragraph V of the petition as alleges that the Commissioner of Internal Revenue has included in the gross estate of the decedent, Elizabeth S. Morgan, her portion of the value of 2,000 shares of Stephenson Redwood Co. stock, and denies the remaining allegations contained in said subdivision (c).

V. (d) Admits so much of subdivision (d) of paragraph V of the petition as alleges that the Commissioner of Internal Revenue has, in arriving at the value of the gross estate of the decedent, included the decedent's proportion of \$184,500.00 of the notes of the Stephenson Redwood Co., and denies the remaining allegations contained in said subdivision (d).

(e) and (f) Denies the allegations contained in subdivisions (e) and (f) of paragraph V of the petition.

VI. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) Herman Oliphant,
Herman Oliphant,

*General Counsel for the Department
of the Treasury*

Of Counsel:

Frank T. Horner,

*Special Attorney, Bureau of
Internal Revenue.*

RFS/y 3/14/36

73

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

Filed Apr
1937.

STIPULATION OF FACTS.

Filed at the Hearing April 13, 1937.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled appeal, by their respective attorneys, that the following facts shall be taken as true and correct and may be introduced as evidence of such facts at the time of the hearing of this cause, subject, however, to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true.

1. That Elizabeth S. Morgan died May 3, 1933, a citizen of the United States and a resident of the City of Oshkosh, County of Winnebago, State of Wisconsin.

2. That the Estate of Elizabeth S. Morgan, deceased, is being administered in the County Court of Winnebago County, Wisconsin.

74 3. That J. Earl Morgan, her husband, of Oshkosh, Wisconsin was duly appointed Executor of the Estate of Elizabeth S. Morgan, deceased, by the County Court of Winnebago County on the 6th day of June, 1933 as evidenced by a copy of the Letters Testamentary attached to the appeal petition in this cause as Exhibit A.

4. That Exhibit A attached to the appeal petition herein is a true and correct copy of the Letters Testamentary issued by the County Court of Winnebago County on June 6, 1933.

5. That Exhibit 1 hereto attached and made a part hereof is a true and correct copy of the Last Will and Testament of

Elizabeth S. Morgan, deceased, and admitted to probate by the County Court of Winnebago County, Wisconsin, on the 6th day of June, 1933.

6. That under date of June 15, 1916 Isaac Stephenson, the father of the decedent Elizabeth S. Morgan, signed, sealed, published and declared his Last Will and Testament. Subsequently he signed, sealed, published and declared three separate codicils thereto under the respective dates of June 21, 1916, January 16, 1917 and May 15, 1937.

7. That Exhibit D attached to the appeal petition herein is a true and correct copy of the Last Will and Testament and codicils of Isaac Stephenson, deceased, and that said Will and codicils were duly admitted to probate in the Estate of Isaac Stephenson, deceased, by the County Court of Marinette County, Wisconsin on the 7th day of May, 1918, incorporated herein by reference.

8. That Isaac Stephenson during his life time on May 12, 1917, executed a certain deed of trust to J. A. Van

Cleve and others, a true copy of which deed of trust is attached to the appeal petition herein as Exhibit C and that said deed of trust is now on file and of record in the County Court of Marinette County, Wisconsin, incorporated herein by reference.

9. That the distributions of principal directed by the said Will and codicils of Isaac Stephenson, deceased, to be made to the said Elizabeth S. Morgan at the end of four, eight and twelve years respectively after the death of Isaac Stephenson as provided in "Item Fifteen" of his said Will were in fact made. That the property remaining in said testamentary trust, as of the date of the decedent's death, under "Item Fifteen", other than the property previously distributed to the decedent as aforesaid, was included in the gross estate by the Commissioner in determining the deficiency.

10. That Isaac Stephenson died March 15, 1918, a citizen of the United States and a resident of the City and County of Marinette, Wisconsin.

11. That the decedent, Elizabeth S. Morgan, by her Last Will and Testament exercised the powers of appointment given her under the deed of trust of Isaac Stephenson, deceased, and to that part of the property which she would have received under the Last Will and Testament of Isaac Stephenson which was to be transferred to her if she should live sixteen years after the death of the said Isaac Stephenson.

12. That an estate tax return was heretofore filed in the

estate of Elizabeth S. Morgan, deceased, which disclosed
76 an estate tax in the amount of \$8,800.89. That thereafter the Internal Revenue Agent made an examination and filed his report, as a result of which certain recommendations were proposed and thereafter a protest was filed by the Executor of the estate of Elizabeth S. Morgan and a hearing had before the Revenue Agent in Charge. Later conference was had with representatives of the Bureau of Internal Revenue and as a result of such hearing and conference, a determination was made by the Commissioner of Internal Revenue and a deficiency was proposed in accordance with the Commissioner's letter of November 12, 1935 directed to J. Earl Morgan, Executor, a true copy of which letter and determination is attached to the appeal petition herein as Exhibit B, incorporated herein by reference.

13. That in accordance with Commissioner's letter of November 12, 1935, the notes of the Stephenson Redwood Company, held by the trustees under the deed of trust of Isaac Stephenson were valued at \$184,500.00 and the stock of the Stephenson Redwood Company, held by the trustees under the deed of trust of Isaac Stephenson was valued at \$454,448.78.

14. That it is now agreed that the true market value on the date of decedent's death May 3, 1933, of the tract of timber owned by the Stephenson Redwood Company and comprising its entire assets was \$375,000.00. That the true market value of the notes of the said Stephenson Redwood Company held by the trustee under the deed of trust of Isaac Stephenson was on said latter date \$184,500.00; that the true market value of the stock of said Stephenson Redwood Company held by the said trustees on said latter date was \$184,488.72. That the difference between the total value of
77 said notes and stock and the total value of the track of timber, which was the only asset of the said Stephenson Redwood Company, is represented by other obligations of the company.

15. That a part of the deficiency proposed by the Commissioner's letter of determination of November 12, 1935 was predicated upon the disallowance of attorneys' fees and Executor's fees and it is now stipulated that there has been heretofore paid by the Executor as and for attorneys' fees and disbursements on behalf of the estate of Elizabeth S. Morgan, deceased, the sum of \$2,785.12; that there has been heretofore paid by the Executor on behalf of the Estate of Elizabeth S.

Morgan, deceased, as Executor's fees and traveling expenses on behalf of the said estate, the sum of \$2,185.64 and that said sums are proper deductions against the gross estate of the said decedent.

16. That the Statutes of the State of Wisconsin in full force and effect on the date of death of the decedent, Elizabeth S. Morgan, provided in part as follows:

"232.05 General power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special power. A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

17. That Section 2105 and 2106 of the Wisconsin Statutes of 1917 were identical with the sections above quoted except as to the section numbers thereof.

78 18. It Is Stipulated and Agreed that the only question now in dispute is whether or not the powers of appointment under the said deed of trust and under the said Last Will and Testament of Isaac Stephenson, as above referred to, are general or special powers within the meaning of Section 302 of the Revenue Act of 1926; provided, however, that nothing herein contained shall deprive the petitioner of proper credit and deduction for State Inheritance taxes upon submission that the State Inheritance taxes have been paid.

Arthur M. Kracke,

Counsel for Petitioner.

Morrison Shafroth,

*Chief Counsel for the Bureau of
Internal Revenue.*

Dated: April 12, 1937.

EXHIBIT 1.

I, Elizabeth S. Morgan, of the City of Oshkosh, Winnebago County, Wisconsin, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking any and all former wills, codicils, bequests and devises and other testamentary dispositions of every kind, by me heretofore made.

First: I hereby give, bequeath and devise to my husband J. Earl Morgan, my home at No. 610 Algoma Street in the City of Oshkosh, Winnebago County, Wisconsin (intending hereby to include all the land, buildings and premises used in connection therewith and as a part thereof, of any and every kind), and my summer home at Pau-ko-tuk, in the Town of Black Wolf, Winnebago County, Wisconsin (intending hereby to include all the land, buildings and premises used in connection therewith and as a part thereof, of any and every kind), together with all the furniture, fixtures, fittings and personal effects therein and all my household effects and personal property used in connection with said home and summer home and all my ornaments, jewelry, clothing and wearing apparel, of any and every kind, excepting only such as may hereinafter herein or otherwise be specifically disposed of, in case he shall survive me, to him, his heirs and assigns, absolutely and forever.

In case my husband shall not survive me, then and in that case I do hereby give, bequeath and devise all of said property, hereinbefore mentioned, of any and every kind, to my daughter, Beatrice M. Chapman, to her, her heirs and assigns absolutely and forever.

If neither my husband nor my daughter Beatrice M. Chapman survive me, then and in that case I do hereby give, bequeath and devise all of said property of any and every kind, to my grandchildren, Elizabeth M. Chapman, Katherine Chapman and Eleanor Chapman, share and share alike, and to them, their heirs and assigns absolutely and forever.

Second: I do hereby give and bequeath to my daughter, Beatrice M. Chapman, if she survive me, the sum of Ten Thousand Dollars (\$10,000.00), payable out of my personal estate.

Third: I do hereby give and bequeath to my granddaughter Elizabeth M. Chapman, if she survive me, the sum of Ten

Thousand Dollars (\$10,000.00) payable out of my personal estate.

Fourth: I do hereby give and bequeath to my granddaughter Katherine Chapman, if she survive me, the sum of Ten Thousand Dollars (\$10,000.00) payable out of my personal estate.

Fifth: I do hereby give and bequeath to my granddaughter Eleanor Chapman, if she survive me, the sum of Ten Thousand Dollars (\$10,000.00) payable out of my personal estate.

80 Sixth: I do hereby give and bequeath to my son-in-law, Arthur B. Chapman, if he survives me, the sum of Two Thousand Dollars (\$2,000.00) payable out of my personal estate.

Seventh: I do hereby give and bequeath to my sister, Harriet Skidmore of Marinette, Wisconsin, if she survive me, the sum of Ten Thousand Dollars (\$10,000.00) payable out of my personal estate.

Eighth: I do hereby give and bequeath to my niece Jane Skidmore, of Marinette, Wisconsin, if she survive me, the sum of Five Thousand Dollars (\$5,000.00) payable out of my personal estate.

Ninth: I do hereby give and bequeath to Mrs. I. W. Stephenson, if she survive me, the sum of Three Thousand Dollars (\$3,000.00) out of my personal estate.

Tenth: I do hereby give and bequeath to my sister-in-law, Grace M. Davies, if she survive me, the sum of Two Thousand Dollars (\$2,000.00) payable out of my personal estate, hoping that it will be used for an European trip.

Eleventh: I do hereby give and bequeath to my brother-in-law, Edward C. Crawford, if he survives me, the sum of One Thousand Dollars (\$1,000.00) payable out of my personal estate.

Twelfth: I do hereby give and bequeath to my friend, Mrs. John S. Gittins, of DePere, Wisconsin, if she survive me, the sum of Twenty-Five Hundred Dollars (\$2500.00) payable out of my personal estate.

Thirteenth: I do hereby give and bequeath to my friend, Margaret Fraker, of Oshkosh, Wisconsin, if she survive me, the sum of Three Thousand Dollars (\$3,000.00) payable out of my personal estate.

Fourteenth: I do hereby give and bequeath to my friend, Mrs. A. L. Osborn, the sum of Three Thousand Dollars

(\$3,000.00) if she survive me, payable out of my personal estate.

Fifteenth: I do hereby give and bequeath to Agnes Bender of Oshkosh, Wisconsin, a faithful employee for a great many years, the sum of Twenty-Five Hundred Dollars (\$2500.00) if she survive me, payable out of my personal estate.

Sixteenth: I do hereby give and bequeath to Sam Stauffer, 399 Vine Street, Oshkosh, Wisconsin, a faithful employee, the sum of Twenty-Five Hundred Dollars (\$2500.00), if he survives me, payable out of my personal estate.

Seventeenth: I do hereby give and bequeath to the First Congregational Church of Oshkosh, Wisconsin, the sum of Five Thousand Dollars (\$5,000.00) payable out of my personal estate.

81 Eighteenth: I do hereby give and bequeath to Rev. David F. Bent, pastor of the First Congregational Church of Oshkosh, Wisconsin, the sum of Five Hundred Dollars (\$500.00) if he survives me, payable out of my personal estate.

"My personal estate" as used in this will means my real and personal property not herein specifically devised and does not include any property of which I may have the power of disposal by power of appointment under the will of my father or under his trust deed hereinafter mentioned.

Nineteenth: I do hereby give and bequeath to the Stephenson Public Library of Marinette, Wisconsin, the painting of the Battleship "Wisconsin".

Twentieth: Upon the death of my husband and myself it is our wish that the needle point furniture in our drawing room should go to the Oshkosh Public Museum, known as the Sawyer Foundation, and I do hereby, in such case and for such purpose, give and bequeath the same to the City of Oshkosh on the death of my husband.

Twenty-First: In a separate memorandum delivered to the Executor of this my last will and testament I have indicated my wish and will as to the disposal of certain items of jewelry, household furniture and other personal property among my friends and relatives, which memorandum is hereby referred to and made a part of this my last will and testament, and the articles therein mentioned are excepted from the provisions of that clause or subdivision of this will numbered "First".

Twenty-Second: Under the last will and testament of my father, Isaac Stephenson, dated June 15, 1916, and which with the several codicils thereto, has been duly admitted to probate

in the County Court of Marinette County, Wisconsin, In Probate, certain real, personal and mixed property (in said will called "all the rest, residue and remainder of my estate, etc.") was given, bequeathed and devised unto Trustees, the survivors of them and their successors in trust, and under said will and under "Item Ten" of said last will and testament of my father, and said trustees were directed and empowered to divide the same into parts of equal value and to number the parts from one to eight, or nine, as the circumstances might require under the terms of said will, and by said will and by "Item Fifteen" thereof said trustees were directed to pay to me the net annual income from part numbered Five (5) and to make certain payments of principal and certain distributions therein provided, and there was given, devised and bequeathed to the appointee or appointees of mine by my last will and testament, all property of any nature and kind in the hands of my said trustees at the time of my death, constituting said Part Five (5) and all property that should thereafter be added to said Part Five (5) from any other part;

Now therefore, by virtue of said power of appointment and in accordance with the provisions of said last will and 82 testament of my father, Isaac Stephenson, I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan, in case he shall survive me, to receive all property of any and every nature and kind in the hands of said trustees under the will of my father, at the time of my death, or thereafter coming to me under said will of my father, constituting said Part Five (5) and all property that may have been heretofore or shall hereafter be added to said Part Five (5) from any other part, and I do hereby authorize him to give full receipts therefor, and I do hereby authorize, direct and empower said trustees under my father's said will to pay over and transfer all of said property to my said husband, J. Earl Morgan, he to have and hold the same as trustee, as hereinafter set forth, and in case my said husband survive me, as aforesaid, I do hereby give and bequeath all of said property of any and every nature and kind in the hands of said trustees under the will of my father at the time of my death or thereafter coming to me under said will of my father, constituting said Part Five (5) and all property that may have been heretofore, or shall hereafter be added to said part Five (5) from any other part to my husband, J. Earl Morgan, in trust, nevertheless, for the following uses and purposes:

To handle, manage, care for, invest and reinvest the same from time to time and after the payment out of the principal, of estate and inheritance taxes as hereinafter provided and in the cases hereinafter provided to pay over to himself individually, and for his own use and behoof, the whole income thereof or of the remainder thereof from time to time as he may in his discretion and judgment determine during the full term of his natural life, and at his death, the principal then remaining I do give and bequeath to my sister, Harriet Skidmore, my nephew, Isaac Watson Stephenson and my niece Mary S. Whitehill, to be equally divided among them, provided, however, that if any one of them shall die before the death of my said husband then and in that case the surviving children of any of them so dying shall be entitled to have and receive the full share in each case that the parent of such children would have received if living.

Provided further, that if any one or more of said three legatees above named shall die without leaving children surviving him or her, that then the share of such deceased legatees shall go to the other legatee or legatees equally, or if either or both of the other legatees are then dead or shall thereafter die, to the children of any deceased legatee or legatees, the intention being that the children of any deceased legatee in any such case shall receive the same share that the parent of such children would have taken if surviving.

If my husband, J. Earl Morgan, does not survive me, then and in that case I hereby nominate, constitute, authorize and appoint my sister Harriet Skidmore, my nephew Isaac Watson Stephenson and my niece Mary S. Whitehill, provided, however, that in case of the death of any one of them then the children of the one so dying shall be entitled to have and receive the same share and interest that their parent would have had if living, to receive all property of any nature and kind in the hands of said trustee at the time of my death, 83 constituting said Part Five (5) and all property added to said part Five (5) and any part heretofore or hereafter added to said part Five (5) from any other part and to receipt therefor, and I do hereby authorize, direct and empower said trustees under my father's said will to pay over and transfer all of said property to them in such case, subject to the payment of inheritance and estate taxes as hereinafter provided; and in case my husband, J. Earl Morgan does not survive me, I give and bequeath to my said sister Harriet Skidmore, my

nephew Isaac Watson Stephenson and my niece Mary S. Whitehill, and in case any of them shall be deceased then the share of such one shall go to their surviving children, such children taking the same share that their parent would have taken if living, all of said property to go subject to the payment of estate and inheritance taxes as hereinafter provided.

Provided further, that if any one or more of said three legatees above named shall die without leaving children surviving him or her, that then the share of such deceased legatee shall go to the other legatee or legatees equally, or if either or both of the other legatees are then dead or shall thereafter die, to the children of any deceased legatee or legatees, the intention being that the children of any deceased legatee in any such case shall receive the same share that the parent of such child would have taken if surviving.

Twenty-third: Under the Deed of Trust dated May 12, 1917, made by my father, Isaac Stephenson to J. W. Van Cleve, Horace A. J. Upham, Harry J. Brown, J. Earl Morgan and Grant T. Stephenson, trustees, he transferred to them and their successor or successors and survivors in trust, certain property described in said trust deed more particularly described under subdivision or paragraph numbered 27 of said instrument, to have and to hold during the continuance of the life of his wife Martha E. Stephenson and himself, and twenty-one years thereafter, and as therein otherwise provided, with provisions upon his death, that the said trustees should divide the trust property in their hands into nine parts and number said parts from One to Nine, both inclusive, and further provided among other things that after his death and during the continuance of the trust, the trustees should pay annually to me the net annual income from said part numbered Five (5), and the principal if I should be living at the termination of the trust, and further provided that if I should die prior to the termination of said trust that then said trustees should pay annually the net annual income from said Part Five (5) to such person or persons as I might appoint by my last will and testament, and that at the termination of the trust said trustees should transfer the property then in their possession, constituting said part Five (5) to such person or persons as I might appoint in the manner aforesaid;

Now therefore, by virtue of said power of appointment and the provisions of said trust deed so made by my father as aforesaid dated May 12, 1917, I do hereby appoint my hus-

band, J. Earl Morgan, to have and receive the annual income after my death of said Part Five (5) as mentioned and described in said trust deed during the full term of said trust or until his death if he shall die before the termination of said trust, my said husband paying out of the same Two Hundred Dollars (\$200.00) per month to our daughter Beatrice M. Chapman, and I do hereby give, bequeath and devise the same as above specified to him for the term of said trust, or until his death if he shall die before the termination thereof; if my said husband shall not survive me, or on his death in case he does survive me and the trust shall not have been terminated, the trustees under the said trust deed so made by my father shall pay the annual income thereof during the balance of the trust period to my sister Harriet Skidmore, my nephew Isaac Watson Stephenson and my niece Mary S. Whitehill, in case they survive me, and out of the said income they shall first pay to my daughter Beatrice M. Chapman the sum of Two Hundred Dollars (\$200.00) per month during the continuance of the trust and the remainder shall be equally divided between them, and in case of the death of any one of them, then the children of the one so dying shall be entitled to have and receive the same share and interest that their parent would have had if living; provided, further, that if any one or more of said three legatees above named shall die without leaving children surviving him or her, that then the share of such deceased legatee shall go to the other legatee or legatees equally, or if either or both of the other legatees are then dead or shall thereafter die, to the children of any deceased legatee or legatees, the intention being that the children of any deceased legatee in any such case shall receive the same share that the parent of such children would have taken if surviving.

At the termination of said trust said trustees under my father's said Deed of Trust shall pay to and transfer to said Harriet Skidmore, Isaac Watson Stephenson and Mary S. Whitehill the property then in the possession of said trustees constituting said Part Five (5), provided that if any one of them be then deceased the children of such deceased person shall have and receive the same share that their parent would have had if living, and I do hereby appoint the said Harriet Skidmore, Isaac W. Stephenson and Mary S. Whitehill, and the children of any one of them that may be then deceased, as the persons to receive and have the same and to receipt there-

for, and I do hereby give and bequeath the same to them and to the children of any deceased one of them as aforesaid.

Provided further, that if any one or more of said three legatees above named shall die without leaving children surviving him or her, that then the share of such deceased legatee shall go to the other legatee or legatees equally, or if either or both of the other legatees are then dead or shall thereafter die, to the children of any deceased legatee or legatees, the intention being that the children of any deceased legatee in any such case shall receive the same share that the parent of such children would have taken if surviving.

85 It being my intention and will that after my death and after the death of my husband the said three legatees, or the survivor or survivors of them, and the children of any deceased one of any of them, shall have the income, after the payment of Two Hundred Dollars (\$200.00) per month to Beatrice M. Chapman if the trust be not then terminated, until the termination thereof, the children of any one of the said three deceased legatees having and receiving the same share that their parent would have had if living, both of income and principal; and that after my death and my husband's death, or at the final termination of the trust, occurring after my death, the property then in the possession of the trustees, or their successors, constituting said Part Five (5) shall go to said Harriet Skidmore, Isaac Watson Stephenson and Mary S. Whitehill, and in case any one of them be then deceased to the children of such deceased one, such children having and taking the same share that their parent would have had if living, and in case of the prior death of any one of said three legatees without children the share of such legatee going to the survivors of said three legatees and the children of any of the deceased one of said legatees, such children of any deceased legatee taking the same share that their parent would have taken if living.

Twenty-fourth: In case any of the principal of said Part Five (5) under the said last will and testament of my father, as hereinbefore provided, shall by virtue of the appointments and provisions of this my last will and testament be paid over to and received by my husband, J. Earl Morgan, as trustee as hereinbefore provided, during his lifetime, for the purposes hereinabove set forth, then I do hereby provide, direct, determine and will that he may as such trustee retain any or all of the property in the same shape and in the same investments that the same are received by him, all in his discretion

and judgment and determination; subsequent investments shall be made in properties and securities suitable for the investment of trust funds under the laws of the State of Wisconsin in force at the time of making such investments.

My said trustee and his successor or successors in the trust shall have and are hereby given full power and authority to determine and finally decide whether any dividend or dividends received on any stock, of any kind, or on and from any interest in stock or on and from any other securities, are capital or income, irrespective of whether the same are paid out of current earnings or surplus paid in or earned and set aside before or after my death, and the said determination of my said trustee, whether evidenced in writing or by his act or acts in paying or distributing the same or setting the same aside, or however evidenced, shall stand and be as the final determination and determinations of any such question or questions and there shall be no appeal therefrom or review thereof in any manner or by any body, judicial, tribunal or court of any kind.

86 It being my intention to have the decision of whether said distributions or dividends are capital or income decided absolutely and forever by my said trustee and without regard to the fact that he may be in any way interested therein.

In case all of the three legatees mentioned in clauses or subdivisions numbered Twenty-second and Twenty-third of this my last will and testament, viz, my sister Harriet Skidmore, my nephew Isaac Watson Stephenson and my niece Mary S. Whitehill, and their children, shall die prior to their, or any of them, or any of their children becoming entitled under the provisions of said numbered clauses or subdivisions of my will to receive any or all of the income or principal as in said respective clauses or subdivisions numbered Twenty-second and Twenty-third provided, then and in that case I do hereby name, constitute, authorize and appoint the then surviving heirs of my father, Isaac Stephenson, taking the same by right of representation and per stirpes and not per capita, to receive and have any and all right and interest and title to income or property which would have accrued to any of said three legatees, and the children of such legatees, from the income or principal from and of said Parts Five (5) under my father's last will and testament, and under his said Deed of Trust of May 12, 1917, as the said three legatees named, or their children, would have been entitled to receive,

and under the same provisions, provided, however, that this shall not apply to any interest of any of the said three named which would go to their children, if any surviving them, as hereinbefore provided; and I do hereby authorize and direct the trustees under the last will and testament of my father and the trustees under the said Deed of Trust of my father dated May 12, 1917, in such cases and at such times only to pay to the surviving heirs of my father, Isaac Stephenson, the said income or said property constituting said Parts Five (5) as would have been paid over to the said three legatees, or their children under the terms and at the times and in accordance with the provisions hereinbefore made, and in case of the death of the said Harriet Skidmore, Isaac Watson Stephenson and Mary S. Whitehill, or any of them, without children surviving any of them, I do hereby so give and bequeath the same to the said heirs of my father Isaac Stephenson, to the end and intending that the said heirs of my father, Isaac Stephenson, shall have all of the interest in the income and principal which said three named legatees, or their children would have had.

It is my will and I do hereby provide that the gifts, bequests, legacies and devises in this my will in clause or provisions numbered "First to Twenty-first", both numbers inclusive, shall be first paid to the various legatees and devises therein named without the deduction therefrom of any estate or inheritance tax, state or federal, or otherwise, therefrom.

It is my will, and I do hereby provide that any and all estate and inheritance taxes, State, Federal and otherwise, shall be first paid out of the remainder of my "personal estate" as hereinbefore defined, and including any increase in my said "my personal estate" hereafter and prior to my death, and it is further my will, and I do hereby direct that if the remainder of "my personal estate" (after paying all legacies and devises in this my will numbered from "First" to "Twenty-first", both numbers inclusive) is not sufficient to pay all estate and inheritance taxes of every kind, State, Federal and otherwise, on all the legacies, gifts, bequests, devises and provisions herein made, including any and all estate or inheritance taxes, State, Federal or otherwise, on any powers of appointment and estate or property passing thereunder, that then and in such case the balance of all such estate and inheritance taxes, State, Federal and otherwise, be paid out of the principal of part five, and the additions thereto, of which I have the power of appointment under

the will of my father, Isaac Stephenson, and which power I have hereinbefore exercised in this my last will and testament, and in case the principal thereof shall pass, and go to my husband as trustee as hereinbefore provided, he is hereby directed and authorized to pay out of the principal of such part and the additions thereto existing at the time of my death, if any, the balance of any and all estate and inheritance taxes, State, Federal and otherwise; and in case of his death before receiving said part and the same going or passing hereunder to others, the same shall be charged for the benefit of my estate and the executor of this my last will and testament and of all those interested therein, with the payment of the balance of all such estate and inheritance taxes, State, Federal and otherwise as shall remain unpaid after applying to the payment thereof the balance of "my personal estate" remaining after the payment of all gifts, bequests, legacies and devises mentioned and described in provisions numbered "First" to "Twenty-first", both numbers inclusive.

Twenty-fifth: All the rest, residue and remainder of my estate of every kind, real, personal and mixed, and wherever situated, after the payment of the bequests, legacies, devises hereinbefore provided, and after the payment of all state and federal inheritance and estate taxes, as hereinbefore provided, and including any and all lapsed or void legacies or bequests of any and every kind (except as hereinbefore otherwise provided), I do hereby give and bequeath and devise to my husband, J. Earl Morgan.

Twenty-sixth: I do hereby nominate, constitute and appoint my husband, J. Earl Morgan, executor of this my last will and testament, and I do request and direct that he be exempted from giving any bond or other security as such executor or as trustee hereunder.

In case my husband should die before I do, then and in that case I do hereby nominate, constitute and appoint the First Trust Company in Oshkosh, a corporation organized and existing under the laws of the State of Wisconsin, executor of this my last will and testament, and do request and direct that it be exempted from giving any bond as such executor or as trustee hereunder in any way.

In Witness Whereof, I have hereunto set my hand and seal this 20th day of April, A. D. 1933.

Elizabeth S. Morgan. (Seal)

Signed, sealed, published and declared by the aforesaid testatrix, Elizabeth S. Morgan, as and for her last will and

testament, in the presence of us, who thereupon at her request, in her presence, and in the presence of each other have hereunto signed and subscribed our names as attesting and subscribing witnesses.

Lilla M. Fulley Residing at Oshkosh, Wisconsin.

R. Morris Redford Residing at Oshkosh, Wisconsin.

89 It Is My Wish and Will That the Following Items of Personal Property Go to the Several Parties as Hereinafter Set Forth, and I Hereby Direct My Executor to Give to Each of Them the Items Mentioned Below:

To Hattie S. Skidmore my sapphire and diamond ring, the oil painting of my mother and the miniature of my mother.

To Isaac Watson Stephenson the oil painting of my father, the miniature of my father and my "Battleship" locket.

To Mary S. Whitehill my three-diamond ring.

To Mary S. Brown my diamond and sapphire pin and marble bust from Venice.

To Georgiana Ludington my diamond and ruby pin.

To Margaret S. Hodgins my pair of blue Sevres vases.

To Mrs. Frank T. Murray, of Evanston, Illinois my Mosaic luncheon set from Naples.

To Beatrice M. Chapman my string of pearls to have during her lifetime and be left by her to Elizabeth M. Chapman.

To Beatrice M. Chapman my diamond wrist watch.

To Elizabeth M. Chapman my pearl ring.

To Katherine Chapman my sapphire and diamond bracelet.

To Eleanor Chapman my diamond and emerald ring.

To Alice L. Osborn my Alencon lace luncheon set.

To Margaret Fraker my Perugia linen luncheon set.

To Grace M. Davies my Mosaic cloth and napkins.

To Mrs. Arthur C. Wells, of Menominee, Michigan, my Venetian cloth and napkins.

To Erna Harmon my orchid enamel dresser set.

To Henrietta Brown my four-yard dinner cloth embroidered and with lace inserts, with napkins.

To Floretta Schriber my print over my writing desk.

To Nellie Downes my marble plaque in the parlor.

Elizabeth S. Morgan (Seal)

Dated this 20th day of April, A. D. 1933.

In Presence of

Lilla M. Fulley

R. Morris Redford.

90

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

Promulgated
Sept. 3

Promulgated September 30, 1937.

Decedent, a resident of the State of Wisconsin, and the donee of two powers of appointment, died May 3, 1933. The powers were created by decedent's father, a resident also of the State of Wisconsin. The instruments creating the powers provided that the income from the properties was to be paid to decedent for life, remainder "to such person or persons as she may appoint by her last will and testament" or, in case she failed to exercise the powers, "to her issue surviving." Decedent exercised the powers by will in favor of her husband. *Held*, under the applicable law of the State of Wisconsin, the powers were "general", and the property passing thereunder is includable in decedent's gross estate under section 302 (f) of the Revenue Act of 1926, as amended by section 803 (b) of the Revenue Act of 1932.

A. M. Kracke, Esq., for the petitioner.

H. F. Noneman, Esq., and *Frank T. Horner, Esq.*, for the respondent.

OPINION.

ARUNDELL: Petitioner seeks the redetermination of a \$43,977.93 deficiency in estate tax. All the issues, except one, have been agreed upon by stipulation and effect will be given thereto under Rule 50. The issue remaining is whether two certain powers of appointment were "general" as determined by respondent, or "special" as contended for by petitioner. The parties filed a stipulation of facts which we incorporate herein by reference and briefly summarize only those facts which are material to a clear understanding of the issue we are to decide.

The decedent, Elizabeth S. Morgan, died testate May 3, 1933, a citizen of the United States and a resident of the State of Wisconsin, and petitioner is the duly appointed executor of her last will and testament. Isaac Stephenson, decedent's father, died testate on March 15, 1918. He was also a citizen of the United States and a resident of the State of Wisconsin. By his last will and testament and several codicils thereto, he conveyed certain property in trust for the benefit of his children. The children were to receive the in-

come annually and a certain portion of the principal at the end of four, eight, and twelve years after his death, and the entire remaining principal at the end of sixteen years after his death, provided they were living at the end of each of the four stated periods. The trust estate was divided into nine parts, part numbered five being conveyed in trust for decedent's benefit as follows:

Item Fifteen: I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate . . .

I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) . . .

The trust further provided that, should decedent die without exercising the power, then whatever portion of the principal remained should go to her issue, and, in the event of her death without issue, then such remaining portion of the principal should be equally divided and distributed among the other remaining parts into which the estate was divided.

On May 12, 1917, Isaac Stephenson executed a deed of trust reading in part as follows:

7. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

If my daughter Elizabeth S. Morgan shall die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment . . . then and in any such event the annual income from said part five (5), . . . shall be paid annually by said Trustees to her issue

surviving . . . and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), . . . to the then surviving issue of my said daughter . . .

During her life decedent received the distributions payable to her at the end of the fourth, eighth, and twelfth years after the death of her father, as provided for in his will, but 91 she did not receive the distribution payable to her at the end of the sixteenth year, owing to the fact that she only lived fifteen years, one month, and eighteen days after her father's death.

By her last will and testament decedent exercised the power of appointment under her father's will as to that portion of the property which she would have received at the end of the sixteen years after her father's death, had she lived, and she also exercised the power of appointment given her by her father's deed of trust, the appointments being in the following words:

Twenty-Second: Under the last will and testament of my father . . . I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan . . .

Twenty-Third: Under the Deed of Trust dated May 12, 1917, . . . I do hereby appoint my husband, J. Earl Morgan . . .

The respondent determined that both powers which decedent exercised by will were "general" powers of appointment; that the value of the property passing under such powers was \$41,212.82 and \$325,613.51, respectively; and that these values should be included in decedent's gross estate under section 302 (f) of the Revenue Act of 1926, as amended by section 803 (b) of the Revenue Act of 1932.

Petitioner contends that the two powers in question were "special" powers rather than "general" powers, as was determined by the respondent. Petitioner does not question the respondent's determination of the value of the property passing under the powers.

Section 302 (f) of the Revenue Act of 1926, as amended by section 803 (b) of the Revenue Act of 1932, provides in part as follows:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .

(f) To the extent of any property passing under a gen-

eral power of appointment exercised by the decedent (1) by will . . .

It has been held that in determining the nature and effect of powers we look to the law of the state having jurisdiction, *Leser v. Burnet*, 46 Fed. (2d) 756; *Christine Smith Kendrick et al., Executrices*, 34 B. T. A. 1040, 1044. In this case the powers were created while the donor was a resident of Wisconsin; the donee was a resident of that state; the property affected is in that state, and the estate of the deceased donee is being administered in the courts of that state.

The statutes of Wisconsin in force when the powers herein were created and when they were exercised define general and special powers as follows:

232.05 General power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever.

232.06 Special power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

These provisions are held by the Wisconsin Supreme Court to apply to both real and personal property. *Will of Zweifel*, 194 Wis. 428; 216 N. W. 840; *Cawker v. Dreutzer*, 221 Wis. 401; 221 N. W. 401, 413.

The two powers here appear to us to come squarely within the above definition of general powers. Each of them "authorizes the alienation in fee, by means of a . . . will . . . to any alienee whatever." They do not contain the specified elements that mark special powers. They do not designate the person or class that may be appointed (232.06 (1)); they do not limit the estate that may be alienated to a particular estate or an interest less than a fee (232.06 (2)). Consequently, it is our opinion that these powers, fitting exactly as they do in the statutory definition of general powers, must be held to be general powers under the law of Wisconsin.

In *Cawker v. Dreutzer*, *supra*, the Supreme Court of Wisconsin states that the Wisconsin statute on powers, being "derived by adoption from New York, should have the same interpretation here as there . . ." The statutes of the two states are almost identical. See sec. 134, Real Property Law, McKinney's Consolidated Laws of New York. The

courts of New York have construed powers such as are under consideration in this case to be general powers. In the case of *In re Lather's Will*, 137 Misc. Rep. 222; 243 N. Y. S. 380, there was a testamentary trust to pay the income to the testator's son for life and then to distribute the corpus to the son's appointees designated by will. The power to appoint was exercised and the court held that "it was a general power exercised by will." On similar facts in *Farmers' Loan & Trust Co. v. Shaw*, 56 Misc. Rep. 201; 107 N. Y. S. 337, it was held that the power was "a general power of appointment without limitation." An early New York case, *Dana v. Murray*, 122 N. Y. 604; 26 N. E. 21, uses almost literally the language of the Wisconsin statute in defining a general power. The definition is, "It is general where it authorizes the alienation in fee by means of a conveyance, will, or charge of the lands embraced in the power to any alienee whatever." These holdings of the New York courts applying their similar statute afford substantial support for our view that the powers in this case are general powers.

92 The case of *Cawker v. Dreutzer*, *supra*, is said by petitioner to be authority for holding these powers to be special powers. In that case there was a testamentary trust to pay the income to plaintiff's mother for life, then to the plaintiff for life with a power of appointment as to the corpus, to be exercised by will. In a suit brought by the donee of the power the two main questions presented were, first, whether the power of appointment was valid, and, second, if the power was valid, whether it gave the donee complete and absolute title in the property. Under the second point the theory of the plaintiff was that there was a merger of her life estate and of her power of appointment. On the first point the court held the power to be valid. In discussing the second point the court said in part:

Neither is the power a general power, as defined in section 232.05, but is a special power under subdivision (2), §232.06, because it embraces an interest less than a fee. The petitioner points to the quoted language in support of the contention that the powers in this case are special powers. We do not so read the opinion of the court. The chief concern of the court was to determine whether the power was one that the Wisconsin statute describes as "an absolute power of disposition." Sec. 232.08. The court held that it was not such a power and consequently there was no merger of estates. As we read the opinion, the court did not have squarely presented to it the question of whether the power

was general or special, and its statement as above quoted is dictum. The *Cawker* case appears to be the only one reported to-date that at all purports to touch upon the question here involved. In view of the fact that the precise question we have was not before the Wisconsin court in the *Cawker* case, we think the quoted words should not be taken as decisive, especially as they appear to be out of harmony with the decisions of the New York courts construing their similar statute. Considering the powers in this case in the light of the language of the Wisconsin statute and the decisions of the New York courts above cited, we hold, as set out above, that the powers were general and that the property passing thereunder is includable in gross estate.

Decision will be entered under Rule 50.

v. 21.

93

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—82771) * *

NOTICE OF PROPOSED REDETERMINATION.

Filed Nov. 21, 1937.

Notice is given that the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, will present the attached proposed redetermination of the estate tax liability in the above-entitled proceeding, under the decision of the Board of Tax Appeals promulgated September 30, 1937, on _____ under Rule 50 of the Rules of Practice before the United States Board of Tax Appeals.

This notice of proposed redetermination is submitted in accordance with the decision of the Board, without prejudice to the Commissioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

(Signed) J. P. Wenchel,
J. P. Wenchel,

Chief Counsel, Bureau of Internal
Revenue.

Of Counsel:

Frank T. Horner,

Ralph F. Steubly,

Special Attorneys, Bureau of

Internal Revenue.

RFS/rb 11/24/37

94 MT-ET-3099-Wisconsin
 Estate of Elizabeth S. Morgan
 Date of death—May 3, 1933

Recomputation of Estate Tax Liability in Accordance With
 the Decision of the Board of Tax Appeals Promulgated Sep-
 tember 30, 1937. Docket No. 82771.

Net estate as shown by Bureau letter dated No-
 vember 12, 1935. (1926 Act) \$479,067.86

Net estate as shown by Bureau letter dated No-
 vember 12, 1935 (1932 Act) 529,067.86

Less:

Decrease in value of 2,000 shares of
 the Stephenson Redwood Co., de-
 scribed in Bureau 30-day letter of
 July 6, 1935 as item-6 under stocks,
 being a part of the corpus of the
 Isaac Stephenson Trust (gross de-
 crease in value of stock \$269,960.06)

Decrease in decedent's 1/8th inter-
 est \$33,745.01

Allowance of executor's commissions 2,185.64

Allowance of attorney's fees 2,785.12 38,715.77

Net estate (1926) as determined in accordance with
 Board of Tax Appeals' decision 440,352.09

Net estate (1932) as determined in accordance
 with Board of Tax Appeals' decision 490,352.09

Adjusted tax liability:

Gross tax (1926 Act) 14,517.60

Credit for State estate, inheritance, legacy, or
 succession taxes 0.00

Net tax (1926 Act) 14,517.60

Total gross tax (1926 and 1932 Acts) 47,745.77

Gross tax (1926 Act) 14,517.60

Additional tax (1932 Act) 33,228.17

Net tax (1926 Act) 14,517.60

Total net tax 47,745.77

Amount assessed on return 8,800.89

Deficiency \$ 38,944.88

No allowance is made for credit on account of State estate, inheritance, legacy, or succession taxes paid, for the reason that the evidence required under Article 9, Regulations 80, has not been submitted.

If the full eighty per cent credit is allowed, the net deficiency tax will be \$27,330.80.

CKM/ofk

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

MOTION.

Filed Nov. 1, 1937.

Now Comes the Petitioner, by Arthur M. Kracke, his Counsel, and moves for an order by the Chairman of this Board to submit for review by the entire Board, the opinion promulgated in this cause on September 30, 1937.

In support of this motion it is stated that the final order fixing the amount of tax deficiency has not been made. It is provided in said opinion that final decision will be made under Rule 50.

The opinion was rendered by one member of the Board as the opinion bears no legend that it was "Reviewed by the Board."

96 The case of *Cawker v. Dreutzer* (221 N. W. 401) on which the petitioner relies is a Wisconsin Supreme Court decision on the question of general and special powers of appointment and was cited with approval by the Board of Tax Appeals in the case of *Helmholz v. Commissioner* (28 B. T. A. 165-175).

In the concluding paragraph of the opinion in this cause the Board rejects the determination of the Court in *Cawker v. Dreutzer* because they appear to be out of harmony with the decisions of the New York Courts construing their similar statute.

Arthur M. Kracke,
Arthur M. Kracke,
Counsel for Petitioner.

Dated: Oct. 30/37.

97

UNITED STATES BOARD OF TAX APPEALS.

Entered Nov.
1937.

• • (Caption—82771) • •

ORDER DENYING REVIEW BY THE ENTIRE BOARD.

On September 30, 1937, Division decision was promulgated in this proceeding and on October 30, 1937, petitioner filed a motion for review by the entire Board of the above mentioned decision.

Petitioner's motion has been carefully read and considered, as well as the entire record in the proceeding and it is not believed that petitioner's motion should be granted.

Accordingly, petitioner's motion for review by the entire Board is hereby Denied.

(Signed) Eugene Black,
Chairman.

Dated: Washington, D. C., November 10, 1937.

98

UNITED STATES BOARD OF TAX APPEALS.

Entered Dec.
1937.

• • (Caption—82771) • •

DECISION.

This proceeding having been called from the Day Calendar of December 15, 1937, for hearing on respondent's notice of proposed redetermination under Rule 50, and there being no objection entered by the petitioner to the respondent's proposal, in accordance therewith, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of \$38,944.88.

(S) C. R. Arundell,
Member.

(Seal)

Entered Dec. 17, 1937.

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

NOTICE OF FILING PETITION FOR REVIEW.

Filed March 9, 1938.

To: John P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Please take notice that the Petitioner, on the 9th day of March, 1938, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Seventh Circuit, of a decision of the said Board heretofore rendered in the above entitled cause. A copy of the Petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated at Chicago, Illinois, this 9th day of March, 1938.

Respectfully:

Davis & Kracke,
Davis & Kracke,
209 S. La Salle St.,
Chicago, Illinois.

Miriam L. Frye,
Miriam L. Frye,
First National Bank Bldg.,
Oshkosh, Wis.,
Counsel for Petitioner.

107 Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 9th day of March, 1938.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

99

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

Filed Mar.
1938.

**PETITION FOR REVIEW BY THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT OF A DECISION BY THE UNITED STATES
BOARD OF TAX APPEALS, FILED DECEMBER 17,
1937.**

Filed March 9, 1938.

The Taxpayer, J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, the petitioner in this cause, by Davis & Kracke and Miriam L. Frye, counsel for said petitioner, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit, of a decision by the United States Board of Tax Appeals rendered on December 17, 1937, determining deficiencies of estate tax in the amount of \$38,944.88, and respectfully shows:

100

1.

J. Earl Morgan, (hereinafter referred to as petitioner) is an individual, duly appointed Executor of the Estate of Elizabeth S. Morgan, Deceased, on the 6th day of June 1933, by the County Court of Winnebago County, State of Wisconsin. The decedent, Elizabeth S. Morgan, was at the time of her death a citizen of the United States of America and a resident of the City of Oshkosh, Winnebago County, State of Wisconsin. The Executor, J. Earl Morgan, was at the time of the decease of Elizabeth S. Morgan and for many years past and is at the present time a citizen of the United States of America and a resident of the City of Oshkosh, Winnebago County, State of Wisconsin, which said City, County and State is within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit. The Commissioner of Internal Revenue, (hereinafter referred to as respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The federal estate tax return of the petitioner was filed with The United States Collector of Internal Revenue for the District of Wisconsin with offices at Milwaukee, Wisconsin on April 30, 1934, which

said collector's office is within the Seventh Circuit of the United States Circuit Court of Appeals.

101

II.

This controversy involves the proper determination of the petitioner's liability for Federal Estate Tax on the Estate of Elizabeth S. Morgan, Deceased. Decedent died on May 3, 1933 and J. Earl Morgan was duly appointed Executor of the said estate on June 6, 1933.

Isaac Stephenson, the father of the decedent, while a resident of the State of Wisconsin, on May 12, 1917, executed a certain deed of trust to J. A. Van Cleve and others, as trustees, in and by the terms of which trust instrument Elizabeth S. Morgan was granted power to appoint, if she died prior to the termination of said trust, by her last will and testament, the person or persons to whom the income and principal of the trust estate at its termination should be paid, and failing to so appoint or, making such appointment and failing to dispose of all the income and principal subject to appointment, then income and principal or part remaining of trust set apart for her, to be paid to her surviving issue. If no issue should survive Elizabeth S. Morgan, and she should make no appointment, then the income and principal of her part of the trust estate shall be distributed among the other then existing parts.

Isaac Stephenson also executed, declared and published a last will and testament on June 15, 1916, together with three codicils dated respectively on June 21, 1916, January 16, 1917 and May 15, 1917. Isaac Stephenson died March 15,

1918 and his will and codicils were admitted to probate 102 in Wisconsin. In and by the terms of said will and testa-

ment, the testator created a trust of certain property, and gave, devised, and bequeathed to the appointee or appointees of Elizabeth S. Morgan, by her last will and testament, all property remaining at the time of her death in her share of the trust estate created under the said will of Isaac Stephenson and provided that should Elizabeth S. Morgan die, leaving issue her surviving and by her will and testament fail to appoint a person or persons to receive the income and principal of her share of the trust estate, then the income during the term of the trust and the principal at the expiration of the trust should be paid to her issue from time

to time her surviving, per stirpes, and if all her issue should die before the termination of the trust and in the absence of any appointment made by her, then trustees are directed to distribute her share of the trust estate, equally, among Isaac Stephenson's remaining trust parts. If Elizabeth S. Morgan should die without leaving issue and without having appointed a person or persons to receive all the property remaining at her death, then her share of the trust estate should cease to exist and be distributed equally among the remaining existing parts in accordance with the provisions of said trust.

Elizabeth S. Morgan died after her father and before the termination of both the said trust created by trust instrument on May 12, 1917 and the said trust created under the said will of Isaac Stephenson. By her last will and testament she exercised the powers of appointment above set forth. The Commissioner of Internal Revenue determined that both the said powers of appointment were general powers of appointment and that the property passing thereunder was includable in the decedent's gross estate under Section 302 (f) of the Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932.

The taxpayer contended, that by reason of and within the purview of the statutes of the State of Wisconsin defining general and special powers, the powers granted were special and not general and therefore the property passing under the said powers should not be included in the gross estate of the decedent. The United States Board of Tax Appeals sustained the Commissioner's determination.

III.

The taxpayer being aggrieved by the conclusions of law contained in the opinion of the Board of Tax Appeals and by its decision entered pursuant thereto, desires to obtain a review by the United States Circuit Court of Appeals for the Seventh Circuit.

IV.

The petitioner assigns as error the following acts and omissions of the said Board of Tax Appeals.

1. The United States Board of Tax Appeals erred in sus-

taining the determination of the Commissioner of Internal Revenue that the powers of appointment under the trust instrument of May 12, 1917 and under the trust created by the will of Isaac Stephenson were general and not special.

2. The United States Board of Tax Appeals erred in sustaining the determination of the Commissioner of Internal Revenue by including in the gross estate of Elizabeth S. Morgan, deceased, for federal estate tax purposes, the property over which decedent was given powers of appointment by trust instrument of May 12, 1917 and under the will and codicils of Isaac Stephenson.

3. The United States Board of Tax Appeals erred in its opinion and decision entered pursuant thereto, that the powers of appointment, granted to Elizabeth S. Morgan by Isaac Stephenson, in his trust instrument of May 12, 1917 and under his will and codicils, were general and not special within the purview of the Statutes of the State of Wisconsin.

4. The United States Board of Tax Appeals erred in its opinion and decision entered pursuant thereto, in refusing to follow the decision of the Supreme Court of the State of Wisconsin, construing the Statutes of the State of Wisconsin concerning powers of appointment.

5. The opinion and decision entered pursuant thereto by the United States Board of Tax Appeals is not supported by the evidence submitted.

6. The opinion and decision entered pursuant thereto by the United States Board of Tax Appeals is contrary to the evidence submitted and the law applicable thereto.

7. The United States Board of Tax Appeals erred in its decision by determining a deficiency in federal estate tax in the amount of \$38,944.88.

Davis & Kracke,

Davis & Kracke,

209 S. La Salle St.,

Chicago, Ill.

Miriam L. Frye,

Miriam L. Frye,

812 First National Bank Bldg.,

Oshkosh, Wis.

State of Illinois, }
County of Cook. } ss.

Arthur M. Kracke, being first duly sworn, says that he is one of the counsel of record in the above entitled case; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge and belief.

Arthur M. Kracke.

Subscribed and sworn to before me this 7 day of March, 1938.

(Seal)

Alvin V. Nygren,
Notary Public.

108

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—82771) * *

Filed Mar.
1938.

PRAECIPE FOR RECORD.

Filed Mar. 9, 1938.

To the Clerk of the United States Board of Tax Appeals:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals:
 - (a) Petition for redetermination, including exhibits attached and Commissioner's notice of deficiency.
 - (b) Answer of the respondent.
3. Stipulation of Facts including Exhibit 1.
4. Opinion of Board of Tax Appeals promulgated September 30, 1937.
5. Notice of proposed redetermination and recomputation attached.
6. Decision of Board of Tax Appeals entered December 17, 1937.
- 109 7. Motion for review by the entire Board.
8. Order denying review by the entire Board.
9. Petition for Review, together with proof of service of

Certificate of Clerk.

notice of filing petition for review and of service of a copy of petition for review.

10. This praecipe.

Davis & Kracke,
 Davis & Kracke,
 209 S. La Salle St.,
 Chicago, Ill.
 Miriam L. Frye,
 Miriam L. Frye,
 First National Bank Bldg.,
 Oshkosh, Wis.

Counsel for Petitioner on Review.

Service of a copy of the above praecipe is hereby admitted this 9th day of March, 1938.

No objection is made thereto.

J. P. Wenchela,

Counsel for Respondent on Review.

UNITED STATES BOARD OF TAX APPEALS.

• • (Caption—82771) • •

CERTIFICATE.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 111, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 17th day of March, 1938.

B. D. Gamble,

Clerk,

United States Board of Tax Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 106, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the fifth day of May, 1938, upon which the following entitled cause was heard and determined:

J. Earl Morgan, Executor of the Estate of Elizabeth
S. Morgan, Deceased, *Petitioner,*

vs.

Commissioner of Internal Revenue,
Respondent.

No. 6611, October Term, 1938 as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of May, A. D. 1939.

Frederick G. Campbell,

(Seal)

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord one thousand nine hundred and thirty-seven, and of our Independence the one hundred and sixty-second.

J. Earl Morgan, Executor of the
Estate of Elizabeth S. Morgan,
Deceased,

Petitioner,

6611

vs.

Commissioner of Internal
Revenue,

Respondent.

Petition for Review of
Decision of the United
States Board of Tax
Appeals.

And, to-wit: On the first day of April, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES-CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6611.

October Term, 1937.

J. Earl Morgan, Executor, etc.,

vs.

Commissioner of Internal Revenue.

The Clerk will enter our appearance as counsel for Petitioner.

Bröde B. Davis,
Arthur M. Kracke,
209 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed April 1, 1938. Frederick G. Campbell, Clerk.

Appearance for Respondent.

And afterwards, to-wit: On the fourth day of June, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6611.

October Term, 1937.

J. Earl Morgan, Executor, etc.,

vs.

Commissioner of Internal Revenue.

The Clerk will enter my appearance as counsel for Respondent.

J. P. Wenchel,

*Chief Counsel, Bureau of
Internal Revenue.*

Frank T. Horner,

*Special Attorney, Bureau of
Internal Revenue.*

Endorsed: Filed June 4, 1938; Frederick G. Campbell,
Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-second.

And to-wit: On the eleventh day of November, 1938, the following further proceedings were had and entered of record, to-wit:

Friday, November 11, 1938.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

J. Earl Morgan, Executor, etc., 6611 <i>vs.</i> Commissioner of Internal Revenue.	}	Petition for Review of Decision of the United States Board of Tax Appeals.
--	---	---

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Brode B. Davis, counsel for Petitioner, and by Mr. Berryman Green Counsel for Respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-second day of April, 1939, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 6611.

October Term, 1938, April Session, 1939.

J. EARL MORGAN, Executor of the Estate
of Elizabeth S. Morgan, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Petition for Review of
Decision of the United
States Board of Tax
Appeals.

April 22, 1939.

Before EVANS and TREANOR, *Circuit Judges*, and LINDLEY,
District Judge.

TREANOR, *Circuit Judge*. Petitioner seeks a review of a decision of the United States Board of Tax Appeals affirming the determination by the Commissioner of Internal Revenue of a deficiency in the estate tax liability of the estate of decedent, Elizabeth S. Morgan. The asserted deficiency resulted from the inclusion in the value of the gross estate of decedent the value of certain property in respect to which the decedent held powers of appointment, which powers she had exercised by her last will.

The Commissioner's action was predicated upon the following provisions of the Revenue Act:¹

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ."

The decedent died testate in 1933 while a citizen of the United States and a resident of the state of Wisconsin, and

1. Sec. 302(f) Revenue Act of 1926, as amended by Sec. 803(b) of the Revenue Act of 1932, 28 U. S. C. A. Sec. 411.

the petitioner is the duly appointed executor of her last will and testament. Decedent's father, by his will and several codicils thereto, created a trust for the benefit of his children. The trust estate was divided into nine parts, the part numbered five being conveyed in trust for decedent's benefit as follows:

"Item Fifteen: I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate * * *

"I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) * * *"

Shortly before his death the father of decedent executed a deed of trust to continue for a period of 21 years after his death. The trust property was divided into parts and one part was allocated to each beneficiary. The following provisions of the deed of trust relate to decedent:

"7. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

"If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

"If my daughter Elizabeth S. Morgan shall die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid."

In her will decedent exercised the powers of appointment granted by her father's will and by the deed of trust, respectively, the appointments being in the following words:

"Twenty-second: Under the last will and testament of my father * * * I do hereby nominate, constitute, authorize, and appoint my husband, J. Earl Morgan * * *

"Twenty-third: Under the Deed of Trust dated May 12, 1917, * * * I do hereby appoint my husband, J. Earl Morgan * * *"

It is not questioned that under the law of Wisconsin the property, which the Commissioner included in decedent's estate under authority of Section 302 (f), passed to decedent's appointee by virtue of the exercise of the powers of appointment. Section 302 (f) selects a particular type of transmission of property through a power of appointment, a type of transmission which is essentially a testamentary disposition, and treats such transmission as a transfer of estate property of the decedent who exercises the power of appointment. In the instant case the decedent had the income of the trust property during her life with the right ultimately to receive the corpus; and under the powers of appointment she had full power to dispose of all of her property interest after her death to whomsoever she might select as her appointee, or appointees. She exercised her powers of appointment by will and under the law of Wisconsin all of the interest which she had in the property passed to her appointee. Consequently, the precise question for decision by this Court is whether the powers of appointment were general powers within the meaning of that term as used in Section 302 (f) of the Revenue Act of 1926, as amended.

It is petitioner-appellant's contention (1) that powers of appointment granted in language substantially the same as that used in the grants in the instant case have been held to be special powers by the Supreme Court of Wisconsin; and (2) that those decisions apply to the facts in the instant case and require the conclusion that the powers in question are special powers, and a holding that the property passing from decedent under her exercise of the powers was improperly included by the respondent, Commissioner, in decedent's gross estate. The foregoing contention presupposes that the language which grants the powers in the instant case must be tested by the definitions of general and special powers recognized by the law of Wisconsin.

The term "general power of appointment" has a well defined legal meaning. Ordinarily it designates a power to appoint any person or persons in the discretion of the donee of the power; and a power of appointment is general regardless of the extent of the property interest which is transferred by the exercise of the power. It is the limitation on the discretion of the donee in the selection of the appointee, or appointees, that distinguishes a special power of appointment from a general. By Treasury Regulation the former meaning of general power of appointment is adopted.

The following definition has been uniformly recognized

by federal courts as a correct statement of the meaning of "general power" as that term is used in the Revenue Act:

"A power of appointment is general when it is exercisable in favor of any person the donee may select, and special or limited when it is exercisable only in favor of persons or a class of persons designated in the instrument creating the power * * *"

We accept the foregoing definition of general power of appointment for the purpose of applying Section 302 (f). The language which creates and grants the powers in the instant case places no restriction on the discretion of the grantee of the powers in respect to the selection of an appointee, or appointees. The language of the grants left the grantee free to exercise the powers of appointment in favor of any person whom she might select. In our opinion the powers were general powers within the meaning of Section 302 (f) of the Revenue Act, and must be treated as such for purposes of this case unless some rule of Wisconsin law controls, as against Section 302 (f), and requires a different result.

The Wisconsin case chiefly relied upon by petitioner is *Cawker v. Dreutzer*.³ In the course of the opinion the Wisconsin Supreme Court stated that the power of appointment which was under consideration and which was granted in language substantially the same as the language used in the instant case was, by statutory definition, a special and not a general power.⁴ The court stated that the power "is a special power * * * because it embraces an interest less than a fee." Respondent-appellee contends that the foregoing statement of the Supreme Court of Wisconsin was dictum. But granting that the statement expressed a holding, the significance of such a holding, for our present purposes, is that under the Wisconsin law the powers of appointment created by the language used in the will and deed herein involved embrace interests less than fees and are therefore, by statutory definition, special powers. But

2. *Johnstone v. Commissioner*, 76 Fed. (2d) 55 (Certiorari denied 206 U. S. 578).

3. 197 Wis. 98.

4. Statutes of Wisconsin, 1937, Sec. 232.05. "General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever."

232.06. "Special Power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

such a power satisfies the definition of a general power as that term is used in Section 302 (f), even though it is characterized as a special power under statutory provisions in Wisconsin.

Petitioner relies on *Leser v. Burnet, Commissioner*,⁵ for a holding that state law determines whether a power is general for federal taxation purposes. In that case decedent exercised a power of appointment and the question was whether the property passing under such exercise should be included in decedent's gross estate for the purpose of computing the federal estate tax. The Circuit Court of Appeals first determined, independently of any local statute or court decisions, the meaning of "general power" as used in the Revenue Act, and held that a general power "is one which may be exercised by the donee of the power in favor of any person whomsoever including the donee himself or his own creditors." The court then said that it was necessary to determine whether the power "is a general power within this meaning of the act of Congress"; and stated that this was to be determined by the law of Maryland. The court then pointed out that in Maryland such grants of power as the one in question were construed strictly, and that unless the language of the grant of power expressly states that the donee may exercise the same for his own benefit or for the benefit of his creditors, then the power does not include the right so to be exercised. And since the grant of power did not expressly so state, the court held that the power did not come "within the meaning of the general power of appointment as that term is used within the Revenue Act." Clearly the court recognized that the definition of a general power for purposes of the Revenue Act is not dependent on state law but is a matter of federal law. The Court considered state law only for the purpose of determining whether the effect of this law upon the language in the grant of power so limited the grant that it did not come within the congressional standard of a general power.

In *Burnet v. Harmel*⁶ the United States Supreme Court uses the following language:

"For the purpose of applying this section to the particular payments now under consideration, the Act of Congress has its own criteria, irrespective of any particular characterization of the payments in the local law. The state law creates legal interests but the

5. 46 Fed. (2d) 750.

6. 287 U. S. 103.

federal statute determines when and how they shall be taxed. We examine the Texas law only for the purpose of ascertaining whether the leases conform to the standard which the taxing statute prescribes
• • •

It is evident that in *Leser v. Burnet*, *supra*, the Circuit Court of Appeals was applying the rule implied in the foregoing statement of the Supreme Court. But the application of that principle cannot aid petitioner's cause in the present case since petitioner's position is that the standard is created and defined by state law. For petitioner to bring his cause within the reasoning and decision of *Leser v. Burnet* it would be necessary to show that the standard created by the federal law was not met in substance and in fact for the reason that under the Wisconsin law the language of the grant of power did not create a power which meets the standard prescribed by the taxing statute for a *general power*.

A recent decision of the Supreme Court in the case of *Lyeth v. Hoey* is in point. In that case the taxpayer was an heir of the decedent whose will had been offered for probate in Massachusetts. The taxpayer began proceedings to contest the probate of the will on certain named grounds. A compromise agreement was thereupon entered into between the taxpayer and the legatee of the bulk of the estate, by the terms of which compromise the taxpayer received certain cash and property. The Commissioner assessed the value of the taxpayer's receipts under the compromise as income. The taxpayer filed suit for a refund, relying upon Section 22 (b) (3) of the Revenue Act of 1932 which exempts from income tax "the value of property acquired by • • • inheritance • • •". The United States Circuit Court of Appeals for the Second Circuit declared the rule to be that whether the property was received by way of inheritance or otherwise depended on the law of the jurisdiction under which the taxpayer received it; and that under the Massachusetts decisions the taxpayer received the property by purchase and not by inheritance. The Supreme Court reversed the judgment of the Circuit Court of Appeals and held that the application of the Massachusetts rule was erroneous.

While recognizing that state law determines the rules, both substantive and procedural, relating to descent and distribution of property within the jurisdiction, the Supreme Court held that in case of receipt of property by an

heir as a result of a compromise it is a federal question "whether what the heir has thus received has been 'acquired by inheritance' within the meaning of the federal statute * * *"

In harmony with the reasoning and holding in *Lyeth v. Hoey*, *supra*, we hold that in the instant case it is a question of federal law whether the property in question passed under a general power within the meaning of Section 302 (f). Consistently with the implications of *Lyeth v. Hoey*, *supra*, and the holding in *Leser v. Burnet*, *supra*, we examine the law of Wisconsin to determine the scope of the powers granted by the language of the will and deed of trust and whether the property in question legally could be transferred by the exercise of the powers. But the scope of the powers having been determined, their generality for purposes of Section 302 (f) is measured by the definition of "general power" recognized by federal law.

Congress can adopt as a part of federal law rules and standards recognized by local law; but such adoption must be indicated by express declaration or necessary implication. But we find no indication of congressional intention to adopt local definitions of "general power of appointment" and thus create diversity of administration of Section 302 (f).⁸

Petitioner urges that even if the language of the grant of powers is sufficient to create general powers their generality is destroyed by certain provisions of the will and the deed of trust which petitioner contends create a right of veto of an appointment which might be made under the powers. This contention is not based upon any doctrine peculiar to the law of Wisconsin but upon petitioner's construction of the language of the provisions.

The clauses of the will and trust deed relied upon by petitioner provide that whenever in the judgment of the trustees there is danger that anything "coming to any beneficiary under this trust (or will)" will be dissipated through intemperate or spendthrift habits, lack of business

8. "Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. * * * There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the differing views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule." *Lyeth v. Hoey*, *supra*.

capacity or subjection to injurious influences of others, or for any other reason, the trustees may withhold from such beneficiary as much as they deem advisable and pay and transfer as much as they deem advisable. Instead of doing the latter the trustees were authorized to expend the funds for the welfare and support of such beneficiary.

Petitioner construes "any beneficiary under this trust (or will)" to include appointees and insists that the power of the trustees to withhold income or installments of corpus from "unworthy beneficiaries" amounts to a veto of the power of appointment of decedent. But we are convinced that a reasonable construction of the language of the so-called *veto* clauses, in the light of related provisions of the will and deed of trust, precludes the inclusion of "appointee" in the term "any beneficiary."

Many carefully worded provisions both of the will and deed indicate clearly that decedent's father intended to differentiate between "beneficiaries" under his will and deed and "appointees" under the wills of his children to whom he had granted powers of appointment. The provisions in the deed of trust which dispose of property or income which is withheld from any "unworthy beneficiary" provide that the property or income shall be transferred to such issue of the unworthy beneficiary as would have taken the property so withheld "in case such unworthy beneficiary had died intestate at the time of such withholding;" and it is further required that in the event there should be no such issue at the time any such property should be payable or transferable, "then such trustee shall pay and transfer and distribute such property so withheld to and among the then other existing remaining parts." It will be noted that the withheld property is to go to the issue of the unworthy beneficiary who would have received it had the unworthy beneficiary died *intestate*. The trustor thus eliminated any appointee under the will of the unworthy beneficiary from participation in "withheld" property, and excluded any such appointee from the class of potential "worthy beneficiaries" under the trust. In the case of a named beneficiary with power of appointment, such as the decedent, who dies intestate, the trust deed provides that when installments of net annual income shall be payable such installments shall be paid to issue then surviving, and that at the termination of the trust the trustees shall transfer all property then in their possession to the then surviving issue of the named beneficiary. Thus the trust instrument designates the class of persons who will consti-

tute "worthy beneficiaries" for the purpose of receiving any payments which are withheld by the trustees from named unworthy beneficiaries. But there are no provisions in the trust deed which control the disposition of any appointee's interest in the trust property in case such appointee should die intestate.

Apt provisions in the will of the father of decedent provide for the disposition of the portion of each *named* beneficiary in case the named beneficiary should die without having exercised the power of appointment. But there is no language which purports to exercise any control over the property when it has passed to an appointee as a result of the exercise of the power of appointment. The provisions of the will which control the disposition of property or income withheld from an "unworthy beneficiary" require the same to be paid or transferred "to such other worthy beneficiary *under my will* who would have been entitled thereto in case such unworthy beneficiary had died." (our italics) But if an "appointee" is to be considered a beneficiary under the will of the father of decedent the trustees cannot identify the "worthy beneficiaries" under the will who are to receive withheld payments until the death of an "unworthy beneficiary" who holds a power of appointment. This follows from the fact that by the terms of the will the issue of a named beneficiary, who holds a power of appointment, receives the beneficiary's property interest in the testamentary trust only in case such beneficiary does not exercise his power of appointment in his will. And this cannot be determined until the death of the named beneficiary. Obviously the intent of the testator, as expressed in the terms of the testamentary trust, was that the trustees be able to select the worthy beneficiaries at the time that payments should be withheld from named unworthy beneficiaries, which could not be done if appointees were treated as beneficiaries under the will.

By the terms of the testamentary trust a named beneficiary who holds powers of appointment is entitled not only to payment of income but also to distribution of designated portions of principal at stated intervals over a period of sixteen years. But an appointee is entitled to the immediate possession and enjoyment of all property in the hands of the trustees at the death of the beneficiary-appointee. The foregoing is inconsistent with an intention on the part of the trustor to apply the *veto* provisions to appointees, since such possession presupposes a period

during which the beneficiaries do not have possession and full enjoyment of the principal.

The father of decedent limited the grant of powers of appointment to his own children, both in the testamentary trust and the deed of trust, although in both the list of named beneficiaries included his wife, his own children, and his grandchildren. Furthermore, powers of appointment were not granted to all of his own children and in the case of some grantees the exercise of the power was conditioned upon the lack of issue at the time of the death of the grantee of the power. In the first paragraph of the deed of trust the trustor recites that it had been his observation that many widows and children had been unable to preserve the principal of the fortune they had inherited and that he desired to provide for the support of his wife and his children and grandchildren. In the testamentary trust there was also a declaration of desire to provide for trustor's wife and children and the issue of his deceased children. The provision authorizing the withholding of property from an "unworthy" beneficiary obviously is included to give effect to the foregoing desire of the trustor to assure financial security for his wife and for his children and their issue. There is nowhere in either trust instrument any indication of interest in the welfare of appointees or their issue. Having carefully chosen the grantees of powers of appointment, the testator evidenced no intention of controlling whatever property passed to any appointees.

In view of the foregoing we conclude that the so-called *veto* provisions do not authorize the trustees to withhold payments of income or installments of principal from appointees.

But even if it could be conceded that the provisions in question authorize the trustees to withhold payments from appointees, the possession of such discretionary power by the trustees does not qualify the general power of appointment of the named beneficiary. The trustees could not prevent the passing of the decedent's right in the trust property to any person appointed by the decedent, even though they might exercise some control over the enjoyment of the property by the appointee. As already stated, there is no provision in either the will or deed of trust which purports to control the descent of the property when once it has been vested in the appointee. The trustees have no control over the selection by a named beneficiary of an appointee; and the extent of the discretionary power of the trustee would be to interfere with an appointee's unrestricted enjoyment of the property.

We hold that the powers of appointment exercised by decedent under the trust and will of her father were general powers within the intent and meaning of Section 302(f), and that the transmission of the property interests in question by the exercise of the powers of appointment by decedent constituted a "passing (of property) under a general power of appointment exercised by the decedent (1) by will . . ."

The decision of the Board of Tax Appeals is

AFFIRMED.

LINDLEY, District Judge, Concurring.

I am in accord with the conclusion reached, but it seems to me unnecessary to decide whether, under *Blair v. Comr.*, 300 U. S. 5 and *Lyeth v. Hoey*, 305 U. S. 188, decided Dec. 5, 1938 and other decisions of the Supreme Court, the character of the power involved is to be determined from consideration of the federal law alone, for I am of the opinion that under the laws of Wisconsin, also, the power was general in character. When it was exercised, the estate of the deceased, under the Wisconsin statutes, was augmented by the amount of property included in the devises and bequests as to which right of appointment existed. The state statute is as follows:

"232.05 General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special Power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated; (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

In asserting that the power involved is special in character, petitioner relies upon *Cauker v. Dreutzer*, 197 Wis. 98. That case concerned a power of appointment in favor of two daughters who were to have the income from the res for life with power of appointment by will. In default of such appointment, the issue of each daughter was to take her interest, and, if one of the daughters died without having exercised the power, the corpus of her interest was to pass to the other daughter, if surviving, or, if not, to that daughter's issue. One of the daughters filed a petition asking that her power be decreed to be general and her estate a fee. The time for exercise of the power had not

arrived. As I read the case, the point involved here was not decided. Any language indicating the conclusion urged by petitioner was unnecessary to the decision. The court refused to pass upon the daughter's request that she had the absolute power of disposition on the ground that the request was not presented to or considered by the trial court. The Supreme Court left the question open.

Here the time for exercise of the power has arrived and it has been executed. I find nothing in the decisions indicating that the Supreme Court of Wisconsin would construe it as other than general in character. Indeed, that court, in the opinion cited, took cognizance of the fact that the Wisconsin statute defining powers of appointment had been adopted from New York and said that it should have the same interpretation in Wisconsin as in New York. Under the New York decisions, such a power as is here being considered is general. *In re Lathers' Will*, 243 N. Y. S. 380; *Farmers' Loan & Trust Co. v. Shaw*, 107 N. Y. S. 337.

Furthermore the power of veto, if any can be attributed to the trustees, never having been exercised and the power to appoint having come to fruition, that is, the property having been disposed of under the power, it should be included in the gross estate of the deceased. To my mind the Wisconsin statute so indicates, and, in the absence of an authoritative decision to the contrary, the Board properly included the property passing under the power. The situation is akin to that where a vested remainder is created, subject to a life estate, and the life tenant has, coupled with his life estate, the power to dispose of the fee and thus defeat the remainder. Quite generally it is the law that such a power to divest the remainder does not prevent the latter from vesting immediately. *Burke v. Burke*, 259 Ill. 262; *Bradley v. Jenkins*, 276 Ill. 161; *Linn v. Campbell*, 289 Ill. 347.

Endorsed: Filed April 22, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-second day of April, 1939, the following further proceedings were had and entered of record, to-wit:

Saturday, April 22, 1939.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. Walter E. Treanor, Circuit Judge.

Hon. Walter C. Lindley, District Judge.

J. Earl Morgan, Executor of the
Estate of Elizabeth S. Morgan,
Deceased,

6611

vs.

Commissioner of Internal
Revenue.

Petition for Review of
Decision of the United
States Board of Tax
Appeals.

This cause came on to be heard on transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this Court that the Decision entered in this cause on December 17, 1937, by the United States Board of Tax Appeals, be, and the same is hereby affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 109 to 124, inclusive, contain a true copy of the proceedings had and papers filed, excepting Briefs of counsel, and Stipulations and Order as to filing briefs, in the case of:

J. Earl Morgan, Executor of the Estate of Elizabeth
S. Morgan, Deceased,

Petitioner,

vs.

Commissioner of Internal Revenue,


Respondent,

No. 6611, October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of May, A. D. 1939.

(Seal)

Frederick G. Campbell,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(4847)

FILE COPY

FILED

JUL 19 1939

RECEIVED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,**

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

BRODE B. DAVIS;

ARTHUR M. KRACKE,

Counsel for Petitioner.

SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1-11
Summary and Short Statement of the Matter Involved	1-8
Reasons Relied On for the Allowance of the Writ	9-11
Brief in Support of Petition	12-46
Opinions Below	12
Statement as to Jurisdiction	12
Statement of the Case	12
Specification of Errors	12-14
Summary of Argument	15-17
Argument	18-46
I. The Circuit Court of Appeals held that the federal law controls and not the law of the State; that therefore the powers of appointment in question are general powers. Such a holding is in conflict with:	
A. (1) The decision of the Circuit Court of Appeals for the Fourth Circuit, in <i>Leser v. Burnet</i> , 46 Fed. (2d), 756, and the decision of the Circuit Court of Appeals for the Third Circuit, in <i>Whitlock-Rose v. McCaughn</i> , 21 Fed. (2d), 164	18-19
(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court holding that the State law controls	20-26

- (3) The decision of the Circuit Court of Appeals is contrary to the decisions of the United States Board of Tax Appeals holding that the State law controls 26-28
- B. (1) The decision of the Circuit Court of Appeals is contrary to the law of the State of Wisconsin pertaining to powers of appointment 28-29
- (2) The argument that Cawker v. Dreutzer, 197 Wis., 98, is dictum is unfounded.... 29-32
- (3) By the statute of Wisconsin, a power is general when it authorizes the alienation of a fee to any alienee; and impliedly an absolute power of disposition, such as a general power of appointment, accompanied by a trust, if given to the owner of an estate for life, shall not be changed into a fee *32-33
- II. The powers in the will and deed of trust are limited by the grant of absolute power to the trustees to annul through withholding property any appointment made by the donee.
- A. (1) The Circuit Court of Appeals should not have held that the restriction in the will and deed of trust against unworthy persons receiving any property applied only to unworthy beneficiaries, and that such restriction did not apply to unworthy appointees. Therefore, it did not limit the donee's power to appoint to any persons whomsoever, worthy or unworthy 33-38
- III. Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.
- A. (1) The intention of a testator or trustor controls over any words, however techni-

cal and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment

39-42

(4) The Circuit Court of Appeals should not have limited its examination into the intent of testator, purporting to support its finding that the powers were general, and should have ascertained his intent not to grant a general power

42

IV. The reservation by Isaac Stephenson to himself in his will and deed of trust of the right to name the line of descent if donee should fail to exercise the power, stamped such power as a special power because it embraced an interest less than a fee

43

V. There is no valid federal definition nor standard of general powers of appointment.

A. (1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.
(a) The attempt to establish this definition and create a standard by promulgation of Regulation 80, is inoperative

44-45

(2) The decisions of the various Courts of Appeals of the United States, purport-

ing to declare a general usage or common law definition of general powers of appointment, followed by the Circuit Court of Appeals in the instant case, are not authority in this case 45-46

VI. The Circuit Court of Appeals erred in not holding as retroactive and void the revenue act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment by the decedent as donee	46
Conclusion	46

TABLE OF AUTHORITIES CITED.

Bank of America v. Commissioner, 90 Fed. (2d) 981, 983	7-10-20-21-22-28
Blair v. Commissioner, 300 U. S. 5.....	10-23-24-25-27
Burnet v. Harmel, 287 U. S. 103.....	7-8-10-20-21-22-25
Cawker v. Dreutzer, 197 Wis. 98.....	5-8-9-10-14-15-26-27-28-29-31-32-43
Commissioner v. Shattuck, 97 Fed. (2d) 790.....	42
Erie R. R. Co. v. Tompkins, 304 U. S. 64.....	45-46
Fidelity Philadelphia Trust Co. v. McCaughn, 34 Fed. (2d) 600 (Third Circuit).....	45
Freuler v. Helvering, 291 U. S. 35.....	10-24-25-27
Great Lakes Hotel Co. v. Commissioner, 30 Fed. (2d) 1	44
Gould v. Gould, 245 U. S. 151.....	26
Green v. Green, 90 U. S. 486.....	40

TABLE OF AUTHORITIES CITED (Continued).

Heiner v. Donnan, 285 U. S. 312	42
Helmholz, Waldemar R. Executor v. Commissioner of Internal Revenue, 28BTA 165 (Wis.) (1933) ..	9-26
Hepburn v. Commissioner, 37 BTA 459	34-40-41
Johnstone v. Commissioner, 76 Fed. (2d) 55	7-45
Kendrick, Christine Smith, etal, Executrices, 34BTA, 1040, 1044	5-9-27
Lang v. Commissioner, 304 U. S. 264, 267 (1938)	7-10-21-22-25
Lederer v. Pearce, 262 Fed. 993, 997, aff'd 266 Fed. 497	42
Lee v. Commissioner, 57 Fed. (2d) 399	45
Leser v. Burnet, 46 Fed. (2d) 756	5-8-9-15-18-20-26-27-34
Lyeth v. Hoey, 305 U. S. 188	8-14-25
Lyons v. Lyons, 233 F. 744, 746	41
Marbury v. Madison, 1 Cranch 138, 174	32
Morgan, J. Earl, Executor v. Commissioner, 103 Fed. (2d) 636; 36 BTA 588 (1937)	5-9-11-12-27
Poe v. Seaborn, 282 U. S. 101	23-25
Sharp, etal v. Commisisoner, 303 U. S. 624, (1938) 91 Fed. (2d) 802	10-24-27
Shepherd, Estate of, v. Commissioner, CCH 1938, Board of Tax Appeals Service, P. 27950, 39 BTA (5) (1939)	10-27-28
Smith v. Bell, 6 Pet. 68, 75	40
Stratton v. U. S. 50 Fed. (2d) 48	45
Swift v. Tyson, 16 Pet. 18	46

TABLE OF AUTHORITIES CITED (Continued).

Thompson v. Garwood, 21 R. C. L. Sec. 3, P. 774; 3 Whart. (Pa.) 287.....	31
Tyler v. United States, 281 U. S. 497.....	27
Union & Peoples National Bank of Jackson, etal, Adm. 30 BTA.1277	27
Warburton v. White, 176 U. S. 484.....	27
Wear v. Commissioner, 65 Fed. (2d) 665.....	45
Whitlock-Rose v. McCaughn, 21 Fed. (2d) 164.9-15-18-19-20	

STATUTES CITED.

Section 232.05 General Power—Wisconsin Statutes	28
Section 232.06 Special Power—Wisconsin Statutes	28
Section 232.08—Wisconsin Statutes	29
Section 302(f) Revenue Act of 1926 as amended 1932	45
Treasury Regulation No. 80 (124).....	44

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1939.

No.

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

1.

**SUMMARY AND SHORT STATEMENT OF THE
MATTER INVOLVED.**

The petitioner, J. Earl Morgan, Executor of the Estate
of Elizabeth S. Morgan, Deceased, prays that this Court

grant the writ of certiorari to review the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, entered April 22nd, 1939 (R. 112) affirming the decision of the United States Board of Tax Appeals (R. 91), which affirmed the determination by the Commissioner of Internal Revenue of a deficiency (R. 10) in federal estate tax against the Estate of Elizabeth S. Morgan, Decedent.

The petitioner, on January 23, 1936, filed his petition with the Board of Tax Appeals (R. 2), praying for a redetermination of a deficiency which resulted from the inclusion by the Commissioner, in the value of the gross estate of said decedent, of the value of certain property in respect of which the decedent held powers of appointment, which powers she had exercised by her last will and testament.

Elizabeth S. Morgan died May 3, 1933, a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, Wisconsin. She left a will (R. 79) which was admitted to probate in the County Court of Winnebago County, Wisconsin, and J. Earl Morgan, petitioner, was duly appointed executor thereof (R. 75).

Isaac Stephenson, the decedent's father, died March 15, 1918, leaving a will dated June 15, 1916 (R. 38) and three codicils (not bearing on this case), the will providing in part for a trust (R. 41) for the benefit of decedent and other beneficiaries. The will and codicils were admitted to probate in the County Court of Marinette County, Wisconsin, on May 7, 1918 (R. 76). In his will the testator directed the trustees under the testamentary trust created in his will to divide his trust estate into nine equal parts. He provided that his daughter, Elizabeth S. Morgan, should receive from his trustees one-fourth of her part of his trust estate, at the end of four, eight, twelve and sixteen years, respectively, after his death (R. 48, 49). She duly received

such one-fourth of her part at the end of four, eight and twelve years, respectively. She died before the expiration of sixteen years after her father's death, and respondent for the purpose of this assessment of the estate tax included the last one-fourth of her part of the said testamentary trust estate in her gross estate (R. 11).

Isaac Stephenson, by his will, gave to the appointee or appointees of his daughter, to be appointed by her will, all the property remaining in her part of the trust estate at her death (R. 49). She exercised the above power by appointing in her will, her husband, J. Earl Morgan (R. 82), during his lifetime to receive the income of all the property in her part of the estate of her father remaining in the hands of his trustee at the time of her death.

The will of Isaac Stephenson further provided, that should his daughter, Elizabeth S. Morgan, die without issue without having by her will appointed a person or persons to receive her part of the property remaining in her father's testamentary trust at the time of her death, then her part of the trust estate should cease to exist, and all the property then remaining in such part should be distributed among the existing remaining parts. The testamentary trust under the will of Isaac Stephenson is not yet terminated.

His will further provided, that if she should die leaving issue, without having appointed such person or persons, then the income from the trust estate should be used by the trustees for the support of such issue, and upon the termination of the trust the principal should go to such issue, *per stirpes* (R. 49).

Isaac Stephenson on May 12, 1917, also executed a deed of trust (R. 13) which by its terms was to terminate twenty-one years after the death of the trustor and his wife

(R. 13). Isaac Stephenson died March 15, 1918. His wife, Martha E. Stephenson, died July 11, 1925. This Deed of Trust is still in full force and effect. It provided that Elizabeth S. Morgan, after the death of her father, should receive the income from a specified part of the trust property to be set apart for her by the trustees of the trust estate. If she should be living at the termination of the trust, she was to receive all of such part of such trust estate then in the possession of the trustees. (R. 18). The deed of trust further provided that should she die prior to the termination of said trust, the trustees should pay the income from her part of the trust estate to the person or persons whom she might appoint by her last will and testament to receive such income during the term of the trust, and the principal upon the termination of the trust (R. 19).

By her will (R. 84, 85) she exercised the above power of appointment by appointing her husband, J. Earl Morgan, to receive during his lifetime the income of all the property embraced within the power, and after his death the principal to go to certain of her relatives.

The Commissioner for the purpose of assessment of the estate tax, included in the value of her gross estate the value of all the property passing under her exercise of said powers of appointment (R. 11).

The Commissioner's action was predicated upon the following provisions of the Revenue Act of 1926, as amended by Sec. 803(b) of the Revenue Act of 1932, 26 U. S. C. A. Sec. 41.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

• • •

“(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . .”

A Stipulation of Facts (R. 75-78) was filed in the case. The principal question in dispute before the Board of Tax Appeals and the Circuit Court of Appeals was whether the powers of appointment under the deed of trust and the will of Isaac Stephenson are general powers of appointment, and the value thereof properly included under the provisions of Section 302(f) of the Revenue Act in the gross estate of Elizabeth S. Morgan. If those powers of appointment are general, the value of the property passing by the exercise of such powers must be included in the value of her gross estate for taxation. If the powers are not general powers of appointment, the value of such property so passing cannot be so included.

The decision of the Board of Tax Appeals was rendered September 30, 1937 (R. 91; 36 B. T. A. 588). In its opinion the Board said, in stating the rule of law applicable to the case (R. 94):

“It has been held that in determining the nature and effect of powers, we look to the law of the state having jurisdiction. *Leser v. Burnet*, 46 F. (2d) 756; *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040, 1044.”

That portion of the syllabus in *J. Earl Morgan, Executor, v. Commissioner*, 36 B. T. A. 588, immediately following the statement of facts, reads: “Held, under the *applicable law of the State of Wisconsin, etc.*” (Italics ours.)

The Board of Tax Appeals held that the case of *Cawker v. Dreutzer*, 197 Wis. 98, cited to the Board by petitioner as declaring the law of Wisconsin, was dictum. The Su-

preme Court of the State of Wisconsin in that case construed words of appointment used in the testamentary trust of one Cawker. Those words were almost identical with the words used in the Stephenson will and deed of trust, viz: "To such person or persons as she may appoint."

The Wisconsin court held that Cawker did not create thereby a general power of appointment but that it was a special power. The Board held, however, that the question of the character of the power of appointment was not before that Court, and its decision was not authority (R. 95, 96)—adopting the contention of the Commissioner.

The Board further held, in effect, that even if the decision in *Cawker v. Dreutzer* had been a holding, the Board would not have followed it, because the decision was "out of harmony with the decisions of the New York courts construing their similar statute." (R. 96.)

Thus, the Board of Tax Appeals followed the decisions of the courts of New York construing the statute of that state instead of the decision of the Supreme Court of Wisconsin construing the statute of Wisconsin.

The petitioner filed his petition for review in the United States Circuit Court of Appeals for the Seventh Circuit, and with it he filed various assignments of error (R. 103, 104). The petitioner made the same contentions before the Circuit Court of Appeals that he had made before the Board. The respondent, however, presented an argument exactly contrary to his argument before the Board. He told the Circuit Court of Appeals that the federal law controlled and not the law of the state, which he had contended before the Board, and as the Board had held was the applicable law.

The Circuit Court of Appeals entered judgment affirming the decision of the Board of Tax Appeals, but upon an entirely different principle of law than the Board had announced. It held that the federal law controlled and under the federal law the powers of appointment in the will and deed of trust were general powers.

The Court cited as its authority the case of *Johnstone v. Commissioner*, 76 F. (2d) 55, which follows other decisions of the Circuit Court of Appeals, declaring the general usage or the common law. We will show later in this petition that those decisions have no binding authority.

The Circuit Court of Appeals improperly held that even though under the Wisconsin law the powers in the will and deed of trust were special and not general powers, yet that fact is immaterial, because such a power as in the Stephenson instruments "*satisfies the definition of a general power as that term is used in Section 302 (f), even though it is characterized as a special power under statutory provisions in Wisconsin.*" (R. 116.)

The Circuit Court of Appeals improperly rejected the contention of the petitioner that the Wisconsin law was controlling. Petitioner argued that a recent decision of the Circuit Court of Appeals for the Ninth Circuit, in *Bank of America v. Commissioner*, 90 F. (2d) 981, to the effect that the state law is immaterial, (p. 983) had been disapproved by this court in *Lang v. Comm'r.*, 304 U. S. 264, 267 (1938). He also showed that the Circuit Court of Appeals for the Ninth Circuit had relied as authority for its decision on *Burnet v. Harmel*, 287 U. S. 103, which this court, as we shall show later, held did not warrant the construction placed upon it by the Circuit Court of Appeals.

The Circuit Court of Appeals in the instant case improperly overruled petitioner's contention that the state law was

settled by the Statutes of Wisconsin, and the decision of the Supreme Court of that State in *Cawker v. Dreutzer, supra*.

The Circuit Court of Appeals should have followed the case of *Leser v. Burnet*, 46 Fed. (2d) 756.

The Circuit Court of Appeals should not have held that petitioner's cause was not within the reasoning and decision of *Leser v. Burnet*.

The Circuit Court of Appeals should not have based its decision that the federal law controls upon the authority (R. 116) of *Burnet v. Harmel, supra*, for the reason that that decision is not the applicable law to this case.

The Circuit Court of Appeals should not have based its opinion on the authority of *Lyeth v. Hoey*, 305 U. S. 188, construing the provision of the taxing law pertaining to an exemption in the federal statutes from certain taxation, which decision we will show later is not applicable here.

Petitioner contended before the Circuit Court of Appeals that the intent of Isaac Stephenson must be ascertained and such intention be effectuated by the court by holding that he did not intend to create general powers of appointment in his daughters, which would grant to them absolute power of disposition over the property.

The Circuit Court of Appeals should have held that, notwithstanding the use in these instruments of technical words the legal significance of which might create general powers of appointment, yet if the intent of Isaac Stephenson is apparent not to employ such words in the technical sense the Court should not give them their technical meaning, and should construe such words to effectuate his intention not to grant a general power of appointment.

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Leser v. Burnet*, 46 F. (2d) 756, and also the decision of the Circuit Court of Appeals for the Third Circuit in *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164.

The Circuit Court of Appeals in the *Leser* case held in a case involving estate tax liability almost identical in its facts with the case at bar, that the law of Maryland, in which State the property was situated, controlled.

Likewise, the Circuit Court of Appeals in *Whitlock-Rose v. McCaughn* held under similar facts that the law of the State of New Jersey, where the property was situated, controlled.

2. The decision of the Circuit Court of Appeals is also in conflict with the decisions of the Board of Tax Appeals in federal cases holding that whether a power of appointment is a general power is determined by the law of the state in which the property passing under the exercise of such power is situated. Those cases are: *Waldemar R. Helmholtz, Executor, v. Commissioner of Internal Revenue*, 28 B. T. A. 165 (Wis.) (1933). In that case, the Board of Tax Appeals cited *Cawker v. Dreutzer*, 197 Wis. 98, as an authority for its decision.

Kendrick, et al., Executrices, v. Commissioner, 34 B. T. A. 1040 (Penn.) (1936).

Morgan v. Commissioner, 36 B. T. A. 588 (1937). This is the case at bar, in which the Board held that the law of Wisconsin is applicable.

Estate of Shepherd v. Commissioner, C. C. H. (1938),
Board of Tax Appeals Service, p. 27950; 39 B. T. A. (5)
(Decided Jan. 4, 1939).

3. The decision of the Circuit Court of Appeals in the instant case is in conflict with the applicable decisions of this Court, viz:

Lang v. Commissioner, 304 U. S. 264 (1938).

Sharp, et al. v. Commissioner, 303 U. S. 624 (1938).

Blair v. Commissioner, 300 U. S. 5 (1937).

Freuler v. Helvering, 291 U. S. 35 (1934).

In all the above cases this Court held that the law of the state and not the federal law controlled as to what property might be included in the gross estate of a decedent for purposes of estate tax assessment.

4. The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Supreme Court of Wisconsin in *Cawker v. Dreutzer*, 197 Wis. 98.

5. The question involved in this case has never been decided by this Court.

As appears from the above conflict of cases, there exists great uncertainty in the minds of the Government's taxing officers, the Board of Tax Appeals, and the Federal Courts, in dealing with this subject. A notable example is *Burnet v. Harmel*, 287 U. S. 103, the meaning of which was misinterpreted by the Circuit Court of Appeals for the Ninth Circuit in *Bank of America v. Commissioner*, 90 Fed. (2) 981.

6. It is important that this question be finally settled by the decision of this Court.

The subject is one in which every citizen of this country owning and devising property is interested; and in which

every member of the bar is concerned, so that he may properly advise his clients.

We think we might say, without presumption, that the officers of the Government must also be desirous of having such a perplexing situation finally settled by the judgment of this Court.

Wherefore, your petitioner, J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and transmit to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all of the proceedings in the case numbered and entitled on its docket, "*Number 6611, J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, Petitioner, v. Commissioner of Internal Revenue, Respondent;*" and that the judgment of said Court, affirming the decision of the United States Board of Tax Appeals, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BRODE B. DAVIS,

ARTHUR M. KRACKE,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

We have analyzed the opinion of the Circuit Court of Appeals and the Board of Tax Appeals in our petition, and will not discuss it further at this place. The opinion appears at Page 112 of the Record and is reported in *Morgan v. Commissioner*, 103 Fed. (2d) 636.

Statement as to Jurisdiction.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals on writ of certiorari is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, paragraph 1, 43 Stat. 938 (Title 28, U. S. C. A., Sec. 347).

Statement of the Case.

The facts are sufficiently stated in the petition to which reference is made.

Specification of Errors.

The petitioner assigns as error the following acts and omissions of said United States Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in affirming the decision of the United States Board of Tax Appeals which affirmed the determination by the Commissioner of Internal Revenue of the alleged deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan.
2. The Circuit Court of Appeals erred in sustaining the action of the Commissioner of Internal Revenue in including, in the value of the gross estate of Elizabeth S. Morgan, for federal tax purposes, the value of property

passing under decedent's exercise of the powers of appointment.

3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the State of Wisconsin and the decision of the Supreme Court of that State to the contrary, are immaterial.

4. The Circuit Court of Appeals erred in failing to ascertain from said will and deed of trust the intention of Isaac Stephenson not to create general powers of appointment.

5. The Circuit Court of Appeals erred in not holding that the intention of Isaac Stephenson not to create general powers of appointment in said will and in said deed of trust was controlling over any language used by him in said instruments pertaining to powers of appointment.

6. The Circuit Court of Appeals erred in failing to hold that the language in the deed of trust and in the will should be liberally construed by the Court in order to effectuate the actual intention of Isaac Stephenson.

7. The Circuit Court of Appeals erred in failing to hold that the powers of appointment in the will and deed of trust were limited by the authority given to the Trustees to withhold property from unworthy beneficiaries thereby annulling any appointment made by the donee, and therefore the donee did not have an unfettered, general power of appointment.

8. The Circuit Court of Appeals erred in holding that the appointees under the exercise of the powers of appointment by Elizabeth S. Morgan were not included within the term "beneficiaries" in the will and deed of trust, and that, therefore, her power to appoint even unworthy appointees was not restricted.

9. The Circuit Court of Appeals erred in holding that the case of *Lyeth v. Hoey*, 305 U. S. 188, was applicable to this case. .

10. The Circuit Court of Appeals erred in holding the case of *Cawker v. Dreutzer*, 197 Wis. 98, to be dictum.

11. The opinion of the Circuit Court of Appeals and its decision entered pursuant thereto are not supported by the facts in this case or the law applicable thereto.

12. The Circuit Court of Appeals erred in entering judgment affirming the decision of the United States Board of Tax Appeals, which affirmed the determination by the Commissioner of Internal Revenue of a deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan, deceased.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals held that the federal law controls and not the law of the State and that under federal law the powers of appointment in question are general powers. Such a holding is in conflict with:

A.

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit, in *Leser v. Burnet*, 46 Fed. (2d), 756, and the decision of the Circuit Court of Appeals for the Third Circuit, in *Whitlock-Rose v. McCaughn*, 21 Fed. (2d), 164;

(2) The decisions of this Court holding that the State law controls;

(3) The decisions of the United States Board of Tax Appeals, holding that the State law controls.

B.

(1) The decision of the Circuit Court of Appeals is in conflict with the statute of the State of Wisconsin pertaining to powers of appointment, and the decision of the Supreme Court of Wisconsin, in *Cawker v. Dreutzer*, 197 Wis. 98;

(2) The argument that *Cawker v. Dreutzer*, 197 Wis. 98, is dictum is unfounded;

(3) The statute of Wisconsin provides that a power of appointment is general only when it authorizes an alienation in fee to any alienee; and, impliedly, an absolute power of disposition, such as a general power of appointment, accompanied by a trust, if given to the owner of an estate for life, shall not be changed into a fee.

II.

The powers in the will and deed of trust are limited by the grant of absolute power to the trustees to annul through withholding property any appointment made by the donee.

A.

(1) The Circuit Court of Appeals should not have held that the restriction in the will and deed of trust (against unworthy persons receiving any property) applied only to unworthy beneficiaries, and that such restriction did not apply to unworthy appointees. Therefore, it did not limit the donee's power to appoint to any persons whomsoever, worthy or unworthy.

III.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from the instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment.

(4) The Circuit Court of Appeals should not have limited its examination into the intent of the testator purporting to support its finding that the powers were general, and should have ascertained his intent not to grant a general power.

IV.

The reservation by Isaac Stephenson to himself in his will and deed of trust of the right to name the line of descent if donee should fail to exercise the power, stamped such power as a special power because it embraced an interest less than a fee.

V.

There is no valid federal definition nor standard of general powers of appointment.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulation 80, is inoperative.

(2) The decisions of various courts of appeals of the United States purporting to declare a general usage or common law definition of general powers of appointment are not authority in this case, as there is no common law of the United States.

VI.

The Circuit Court of Appeals erred in not holding as retroactive and void the Revenue Act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment by the decedent as donee.

ARGUMENT.

I.

The Circuit Court of Appeals held that the federal law controls and not the law of the State; that therefore the powers of appointment in question are general powers. Such a holding is in conflict with:

A.

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit, in *Leser v. Burnet*, 46 Fed. (2d), 756, and the decision of the Circuit Court of Appeals for the Third Circuit, in *Whitlock-Rose v. McCaughn*, 21 Fed. (2d), 164;

In the *Leser* case, the power of appointment was created in an instrument of trust which provided that, upon the decease of the donee, the Trustee was to hold the property in trust for the use of "such person or persons as she by her last will and testament * * * shall have appointed to take the same." The donee duly exercised the power by her will. The Board of Tax Appeals affirmed the determination of the Commissioner of Internal Revenue including, for the purpose of taxation of the estate of the decedent donee, the value of the property passing under the exercise of her power of appointment. The question before the Circuit Court of Appeals for the Fourth Circuit was precisely the same which is presented here, viz: Can the Commissioner lawfully include the value of such property in decedent's estate for purposes of estate taxation?

The Court held that the question whether the power of appointment was a general power was to be determined by the law of Maryland, stating that (p. 760) "we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that State and relating to property there situate." The Court found that it was the settled law of the State that the power in question was not a general power; that under the law of Maryland the donee had no right under the power to exercise it in favor of her creditors; and that such right is a fundamental characteristic of a general power of appointment. Lacking that right in Maryland, the power of appointment was not general.

The Court therefore held that the Commissioner should not have included in the gross estate of the donee, for taxation, the property passing under the power of appointment.

As to the objection urged by the Commissioner, to the Court's holding (p. 761) that its effect "is to destroy the uniformity of operation of the statute, as the language used would unquestionably create a general power in most other States. We do not think so. The Revenue Act provides for the inclusion only of property passing under general powers; and if a will or deed, as properly interpreted under the applicable law, creates a power which is not general but special or limited, it does not fall within the meaning of the Act."

The Circuit Court of Appeals in *Whitlock-Rose v. McCaughn*, 21 F. (2d), 164, held that where the property passing under the power was situated in New Jersey, the law of New Jersey controlled on the question as to whether the power was a general power of appointment.

No application was ever made for a writ of certiorari from this Court to review the decisions of the Circuit Courts of Appeal in *Leser v. Burnet*, and *Whitlock-Rose v. McCaughn*. The decisions stand and have stood ever since their rendition, unquestioned by any decision of this Court.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court holding that the State law controls.

The Circuit Court of Appeals of the Seventh Circuit, in the instant case much in the same manner as did the Circuit Court of Appeals for the Ninth Circuit in the case of *Bank of America v. Commissioner*, 90 F. (2d) 981 (1937), has extended the holding of this court in *Burnet v. Harmel*, 287 U. S. 103, 110, far beyond the meaning of that decision. In the *Bank of America* case three Judges sat, out of seven Judges constituting the Court of Appeals for that Circuit. The Court had before it the question as to whether the federal taxing power was bound by the California community property law in determining the nature and ownership of the property, the value of which was sought to be included in the gross estate of the decedent for purposes of estate tax assessment.

In that case, the decedent and his wife were residents of California. Decedent took out certain policies of life insurance on which the premiums were paid out of community property. California Civil Code, Sec. 161a provides that the respective interests of the husband and wife in community property are present, existing and equal interests. On decedent's death his Executor included in the estate tax return only one-half of the amount of these policies in the gross estate. The Commissioner included the full amount of the policies as being owned

by the decedent. Decedent's executor contended that under the California community property law, the wife was the owner of one-half of the proceeds of the insurance policies, and therefore the decedent had no power of disposition or control at his death over the wife's half of such proceeds, and the estate could not be taxed for such half. The majority of the Judges sitting held, under a misapprehension of the meaning of *Burnet v. Harmel*, *supra*, (1) that the state law could control only when the taxing statute made its operation dependent on state law; (2) that there was nothing to indicate that the taxing statute (Sec. 302 (g)) made its operation dependent on California law; and (3) therefore the federal law controlled as to the question whether the decedent was the owner of the proceeds of all the life insurance policies. They therefore held that "the local law is immaterial." (*Bank of America v. Comm'r.*, 90 Fed. 2d, 983.)

Less than a year subsequent to the above decision, the case of *Lang v. Commissioner*, 304 U. S. 264 (1938) came before the Circuit Court of Appeals for the Ninth Circuit. While that case was pending, three of the seven judges of the court certified propositions of law to this Court (C. C. H., Federal Tax Service (1938) Vol. 4, p. 9819), setting forth that the decision rendered by two of the judges out of three who sat in the case of *Bank of America v. Comm'r.*, *supra*, did not represent the view of the remaining five Judges of the Court. They requested this Court to give instructions to the Circuit Court of Appeals for the proper decision of the case then before it—the *Lang* case. The certificate recited that these two judges had held that the statutes of California relating to community property could not affect the interpretation of the Revenue Act.

The facts in the *Lang* case, in which the judges of the Circuit Court of Appeals certified the propositions, were

that Lang and his wife lived in the State of Washington (where community law obtains), until his death, at which time certain policies of insurance upon his life were in force. All the premiums upon the policies were paid for from community funds. The Commissioner of Internal Revenue determined that the proceeds from all such policies were part of the insured's gross estate and assessed accordingly. The assessment was upheld by the Board of Tax Appeals.

Pursuant to the certificate of the Circuit Court of Appeals, requesting instructions, this Court in *Lang v. Commissioner*, 304 U. S. 264, instructed the Circuit Court of Appeals that only one-half of the proceeds from the insurance policies became a part of the decedent's gross estate; that the estate could not be taxed for the other half of the proceeds of the policies which was owned by his wife under the provisions of the Community Property Law of the State of Washington. This Court ruled that the state law controlled.

The Circuit Court of Appeals in *Bank of America v. Commissioner, supra*, based its ruling that the local law was immaterial on the supposed authority of *Burnet v. Harmel*, 287 U. S. 103, which had held that the State law controlled only when the taxing statute makes its operation dependent on State law.

This Court, in *Lang v. Commissioner*, 304 U. S. 264, answered the request by the Judges of the Circuit Court of Appeals for instructions, and said that the holding in the *Bank of America* case, that local law was immaterial, is "not accurate and conflicts with what we have said." (p. 267.)

In *Poe v. Seaborn*, 282 U. S. 101, the question before this Court was as to whether the Commissioner could tax against the husband the entire income received from community property owned by him and his wife in the State of Washington, or whether each should be taxed for one-half of the income on such property. This Court held that whether the interest of the wife in community income is taxable apart from the interest of the husband, was to be determined by the state law of Washington (p. 110), and that under that law the income of only one-half of the property could be taxed to the husband.

Another case in which the Court applied the rule that local law controls is *Blair v. Commissioner*, 300 U. S. 5. In that case a beneficiary under a trust assigned to third persons part of his income from the trust. In a case in a state court construing the will under which the trust was created, the Appellate Court of Illinois held that the trust was not a spendthrift trust and that the beneficiary's assignment was valid. The Commissioner of Internal Revenue contended that, notwithstanding the Court's decision the trust was a spendthrift trust, the assignment was invalid, that it must be ignored, and that the beneficiary was liable for a tax upon the entire income, regardless of the assignment, because he was still the owner of the income, as he had never legally assigned it. This Court held that the decision of the Appellate Court of Illinois was binding upon the Federal taxing power, and that the beneficiary could not be taxed upon the income which he had assigned. The Court said that the question of the validity of the assignment is a question of local law. The donor was a resident of Illinois and his disposition of the property in that state was subject to its law. "By that law, the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign

that interest, in whole or in part, are to be determined. The decision of the State Court upon these questions is final." (p. 9) (Emphasis ours.)

In *Sharp v. Commissioner*, 91 F. (2d) 802, the Circuit Court of Appeals for the Third Circuit sustained an assessment by the Commissioner of Internal Revenue against decedent's estate on property which the Commissioner determined was owned by the decedent at the time of his death. Decedent's executors contested the assessment and claimed that the property was owned by a trust estate created by the decedent. The ownership had been decided by the decree of a State Court of competent jurisdiction which had held that the decedent did not own the property but that it was owned by the trust estate. The reason given by the Circuit Court of Appeals for sustaining the assessment and disregarding the decision of the State Court, was that the decision was binding only upon distributees of the estate, *but it could not bind the taxing power of the Government.*

On certiorari granted, this Court, in *Sharp v. Commissioner*, 303 U. S. 624 (1938), reversed the decision of the Circuit Court of Appeals, citing *Freuler v. Helvering*, 291 U. S. 35, 43, 45; *Blair v. Commissioner*, 300 U. S. 5, 9, 10.

In *Freuler v. Helvering*, *supra*, this Court held that the decree of a state court holding that annual deductions for depreciation of trust property should have been taken from gross income before making distributions to beneficiaries, establishes the rights of the parties, and permits deductions from distributable income on account of depreciation. Further, that this order of the state court governed the distribution and was effective to fix the amount of the taxable income of the beneficiaries. The Circuit Court of Appeals held that the decision of the State Court was not conclusive in the administration of

the Federal Revenue Act. This Court overruled the Circuit Court of Appeals, and held that the decision of the State Court established the law of California on the property rights of the beneficiaries; and that it must control in applying an income taxing act (p. 45).

The decisions of this Court in *Lang v. Commissioner*, *Poe v. Seaborn*, *Blair v. Commissioner*, and *Freuler v. Helvering*, show the intention of this Court not to have the meaning of its language in *Burnet v. Harmel*, 287 U. S. 103, enlarged beyond the scope intended by the Court in deciding the case on the facts before it.

We contend that the rule announced in the above cases, that the State law controls, is strictly applicable to the instant case, and that the Circuit Court of Appeals erred in not holding to that effect.

It may be replied that this Court in the case of *Lyeth v. Hoey*, 305 U. S. 188, did not follow the rule laid down in the *Lang*, *Poe*, *Blair*, *Sharp* and *Freuler* cases. The complete answer to such an argument is that, in the *Lyeth* case the Court was concerned only with Section 22 (B) (3) of the Revenue Act, which exempted from income "the value of property acquired by gift, bequest, devise or inheritance." The Commissioner in that case attempted to assess an income tax on property which the taxpayer contended he had acquired by inheritance, and that it was therefore, under the statute, exempt from income tax. The Commissioner insisted that under the law of Massachusetts, which controlled, the property had not been acquired by inheritance, and therefore was not exempt.

The Court held that the question as to the construction of an exemption of the federal statute, is not determined by local law. The feature that distinguishes the *Lyeth* case from the case at bar is that the *Lyeth* case involved an exemption provision of the revenue law, whereas the

other decisions of this court cited above involved a *taxing* provision of that law. Clearly, Congress does not have to consult State law in determining what property will be omitted from taxation. It is when Congress seeks to impose the burden of a tax upon property of the taxpayer, and the law of the State in which the property is situated has determined the nature of that property, that the state law must control, and its decision is binding on the taxing power of the Government. The rules for construction as between an exemption provision and a taxing provision are quite different. In interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their operations so as to embrace matters not specifically pointed out, and in case of doubt they are construed most strictly against the Government and in favor of the citizen. *Gould v. Gould*, 245 U. S. 151.

In Paul on "Selected Studies in Federal Taxation," Second series (p. 12), the author states:

"The Federal estate tax consciously incorporates state law by its reference to 'a general power of appointment' in Sec. 302(f) . . ."

(3) The decision of the Circuit Court of Appeals is contrary to the decisions of the United States Board of Tax Appeals holding that the State law controls.

These decisions are:

(a) *Waldemar R. Helmholtz v. Commissioner*, 28 B. T. A., 165. This case followed the rule that the law of the state controls, citing with approval *Leser v. Burnet*, 46 F. (2d) 756 (p. 173), and *Cawker v. Dreutzer*, 197 Wis. 98 (p. 175).

(b) *Christine Smith Kendrick, et al., Executrices, etc., v. Commissioner*, 34 B. T. A. 1040, in which the Board held that the federal taxing power was bound by the law of Pennsylvania in determining the effect of powers of appointment (p. 1044).

(c) *J. Earl Morgan, Executor, v. Commissioner*, 36 B. T. A. 588, the instant case, in which the Board held (p. 591) that "in determining the nature and effect of powers we look to the law of the State having jurisdiction." It is apparent from the decision of the Board that the only reason it did not hold the power in the *Morgan* case to be a special power of appointment on the authority of *Cawker v. Dreutzer*, 197 Wis. 98, is that it believed the decision in that case to be *dictum*, as contended by the respondent.

(d) *Estate of Frederick Shepherd v. Commissioner*, 39 B. T. A., No. 5 (January, 1939); C. C. H. Board of Tax Appeals Service (1938) (p. 27,950), in which the Board held that a decision of a *nisi prius* court in Illinois, holding a power of appointment not to be a general power, is binding on the taxing power of the government. In that case the Board said (p. 27,952) that "the Board, like the Federal courts, is bound by decisions of the state courts, in regard to property rights, and the effect of conveyances executed within the State relating to property situated therein." Citing *Warburton v. White*, 176 U. S. 484; *Tyler v. United States*, 281 U. S. 497; *Leser v. Burnet*, 46 F. (2d) 756; *Freuler v. Helvering*, 291 U. S. 35; *Blair v. Commissioner*, 300 U. S. 5; *Sharp v. Commissioner*, 303 U. S. 624; *Union & Peoples National Bank of Jackson, et al., Administrators*, 30 B. T. A. 1277 (Dec. 8649); *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040 (Dec. 9480). It will be noted that the Board

of Tax Appeals, in *Estate of Frederick Shepherd v. Commissioner, supra*, cited the Sharp, Freuler, and Blair decisions of this court, as authority for its holding that the state law controls as to whether the federal government can tax a power of appointment as a general power.

It thus appears that the Board of Tax Appeals, as late as January, 1939, is still applying the rule that the State law controls in these general powers of appointment taxing cases, while the Circuit Courts of Appeals are still deciding, as in the instant case, that the federal law controls, following the disapproved decision in *Bank of America v. Commissioner*, 90 F. (2d) 981.

B.

(1) The decision of the Circuit Court of Appeals is contrary to the law of the State of Wisconsin pertaining to powers of appointment.

The Supreme Court of the State of Wisconsin, in *Cawker v. Dreutzer*, 197 Wis. 98, as we have said, construed the power of appointment in a will and testamentary trust not to be general powers of appointment but special powers.

The applicable statute of Wisconsin is as follows:

"Sec. 232.05. *General Power*. A power is general when it authorizes the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power to any alienee whatever."

"Sec. 232.06. *Special Power*. A power is special:
(1) When the person or classes of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will or charge of a particular estate or interest less than a fee."

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts."

In the *Cawker* case, one of the donees of powers of appointment filed a suit setting forth that she and her sister had been given, under the will and trust, a life income in the property, that they were also donees under the general powers of appointment, and by virtue of such powers they had complete and absolute title to the property. They also alleged that they had an absolute power of disposition under said powers of appointment, and as donees thereunder they should be adjudged by the Court to hold the fee. The Court held that the powers of appointment did not give them absolute power of disposition of the property, nor the complete and absolute title thereto, nor the fee to the property, and that the powers of appointment were not general powers.

(2) The argument that *Cawker v. Dreutzer*, 197 Wis. 98, is dictum is unfounded.

The contention that the decision in *Cawker v. Dreutzer*, 197 Wis. 98, is dictum is without foundation. The contention was first presented by the respondent before the Board of Tax Appeals, which adopted it in its decision. It was stated as a finding by Judge Lindley of the Court of Appeals, who concurred in the majority opinion. The argument that the *Cawker* case is not a holding is based upon the unsupported assertion that the question as to whether the powers of appointment were general powers

was not before the court. The charge of *dictum* completely ignores the words of the Supreme Court of Wisconsin in its opinion. There it recited (p. 129) the questions before it for consideration and among others: "(3) Whether the powers of appointment in the will were valid, and, if so, their effect."

The charge of *dictum* also ignores the statement of the Court in its opinion as to the pleadings (p. 133) as follows:

"It is claimed by the plaintiff respondent that having the power of appointment whereby they may dispose by will of the whole estate absolutely and having a life estate, the two estates merge, and the daughters had complete and absolute title in the property."

It is insisted in effect that the Supreme Court had no such pleading or claim of the plaintiffs before it at the time of the hearing or of the rendition of the judgment in the case. Also that the only attempt of either of the donees to present such a pleading or claim to the court was in a pleading known in Wisconsin practice as Application for Review of Judgment, filed after the case had been tried. The facts are that the request was made after the rendition of judgment, but it was only a *repetition* of the first complaint filed by the plaintiff in the suit.

An examination of the files in this case in the Supreme Court of Wisconsin shows this clearly. The transcript of the record filed in the Supreme Court at the August Term, 1928, contains the complaint of the plaintiff in which the following language appears (p. 5):

"Therefore, this plaintiff demands the judgment of the Court in the premises of adjudging and declaring: (1) Whether the plaintiff shall not be deemed, by virtue of the power given to her by said will, to possess an absolute power of disposition of her half of the

residuary estate, within the meaning of the statutes of the State of Wisconsin; (2) whether, under the provisions of the State of Wisconsin, and by virtue of the absolute power of disposition given to her, and as grantee of the power, she is not entitled to an absolute fee in the one-half of the residuary estate of E. Harrison Cawker, Deceased." (Italics ours.)

In the same transcript (p. 24) appears the plaintiff's amended complaint, in which the above requests are made in the identical language.

The files in the Supreme Court also contain the brief of Leonore H. Cawker, the plaintiff in the case, in which appears (p. 15) the following, viz:

"The respondent, Leonore H. Cawker, requested both in her complaint, and in the proposed findings, that the court adjudicate whether this plaintiff shall not be deemed *by virtue of the power* given to her by said will to possess an absolute power of disposition of her one-half of the residuary estate. * * *

"This request is *repeated* in her application for a review, served and filed therein." (Italics ours.)

The "absolute power of disposition" prayed for in the complaint is a synonym for "general power of appointment." 21 R. C. L., Sec. 3, p. 774, citing *Thompson v. Garwood*, 3 Whart. (Pa.) 287.

It thus appears, as the Supreme Court stated specifically in its opinion, that the plaintiff in her complaint had asked for an adjudication of the exact question which the court determined by its decision.

The meaning of the words in respondent's brief above referred to "that this request is *repeated* in her applica-

tion for review" (in the Supreme Court) is that Leonore Cawker had not attempted to perfect an appeal from the decree of the Circuit Court *until subsequent to the appeal perfected by another defendant, Hortense Cawker Merrill.*

The Practice Act of the law of Wisconsin at that time provided that if one of several joint or several defendants attempts to appeal, after another defendant had appealed, the latter defendant so appealing must, *in a petition for review of the judgment, repeat the allegations of her petition*, in order to present her exceptions to the Supreme Court. It was this *second and repeated request*, made by Leonore Cawker after judgment, in her petition for review of judgment, which the court *refused to entertain*. Due consideration given to the words of the Court in *Cawker v. Dreutzer* would have shown how unfounded was the charge of dictum in this case. We have had to adopt an unusual procedure to present the facts in this case to this Court but felt it only fair to ourselves and to the Court that they should be presented.

(3) By the statute of Wisconsin, a power is general when it authorizes the alienation of a fee to any alienee; and impliedly an absolute power of disposition, such as a general power of appointment, accompanied by a trust, if given to the owner of an estate for life, shall not be changed into a fee.

Section 232.08, which appears at page 29 of the Argument, provides that when an absolute power of disposition *not accompanied by a trust* shall be given to the owner of an estate for life, such estate shall be changed into a fee. These are affirmative words which also convey a negative meaning. As said by this Court in *Marbury v. Madison*, 1 Cranch, 138, 174:

"Affirmative words are often in their operation negative of other objects than those affirmed; and in this

case a negative or exclusive sense must be given to them or they have no operation at all."

In applying this principle to Section 232.08 of the statute in question it is plain that the effect of the statute is to declare that an absolute power of disposition, *accompanied* by a trust, shall *not* be changed into a fee when given to the owner of a life estate.

It would therefore appear that by the law of Wisconsin a power, *accompanied* by a trust, is not subject to the payment of the donee's debts, is not equivalent to absolute ownership so as to be taxable under Section 302(f) of the Revenue Act and is not a general power of appointment.

II.

The powers in the will and deed of trust are limited by the grant of absolute power to the trustees to annul through withholding property any appointment made by the donee.

A.

(1) The Circuit Court of Appeals should not have held that the restriction in the will and deed of trust against unworthy persons receiving any property applied only to unworthy beneficiaries, and that such restriction did not apply to unworthy appointees. Therefore, it did not limit the donee's power to appoint to any persons whomsoever, worthy or unworthy.

The petitioner has assigned as error the failure of the Court to hold that the power given to the trustees in Item 15 (R. 26) and in Item 26 (R. 61) was a positive restriction upon the powers of Elizabeth S. Morgan to appoint. The restriction is implicit in the very grant of the power to her.

Item 15 of the deed of trust (R. 26) and Item Twenty-Six of the will (R. 61) provide that whenever in the judgment of the Trustees, the trust property going to

any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for any other reason or reasons*, the trustees shall withhold, if they deem it best, from any such beneficiary, the whole or any part of said trust property, whether income or corpus (Emphasis ours). By reason of this right of the trustees to nullify the exercise by the donee of the powers of appointment they are unquestionably special powers and not general powers. *Hepburn v. Commissioner*, 37 B. T. A. 459. In that case the Board of Tax Appeals held that a power of appointment, the exercise of which at any time is in fact subject to the discretionary approval of individual trustees appointed by the donor of the power, is not a general power of appointment and property passing thereunder is not within the Revenue Act, Section 302 (f).

In the instant case, the right of the trustees to withhold property, *for any reason*, from an appointee is in effect the right to annul the power, and that right exists and will continue to exist for seven years. The trustees can at any time thus render any appointment ineffective and inoperative. The powers of appointment, therefore, are not "unfettered": (*Leser v. Burnet*, 46 Fed. (2d) 756.) *The property therefore has not "passed" and consequently there has been no "passing" of the property or its value to be taxed.*

The restriction upon the powers of appointment, through the right of the trustees to withhold property applies to the appointees in whose favor the power may be exercised by the donee, and the provision regarding the withholding of property embraces any appointee in whose hands the property, in the judgment of the trustees, might be dissipated or improvidently handled, through intemperate or spendthrift habits, lack of business capacity, or subjection to

the injurious influence of others affecting business capacity, or for any other reason or reasons. The judgment of the trustees is final and conclusive.

The restriction is an actual declaration by the donee's father to her, that the class described by him in the above words as being disqualified, must not be appointed by her in the exercise of her power of appointment.

The fact that the determination of the authority of the trustees to nullify the donee's exercise of the power, is confided to the judgment of the trustees, does not argue in any wise that there is no limitation of the power of appointment. The donee exercising the power is under the same restrictions in respect to that exercise as are the trustees in determining the propriety of the exercise. It is not a situation where the grant of power may be exercised by the donee regardless, with, for instance, a succession of appointees, each one after the other, who have been declared by the trustees to be of the forbidden type. The provision is a sensible one and binding upon Elizabeth S. Morgan to the same extent as upon the trustees. The donor obviously in the limitation stated was speaking to Elizabeth S. Morgan in the same voice with which he was speaking to the trustees. This is not the case of a grant of unlimited power of appointment to Elizabeth S. Morgan subject to defeasance at the will of the trustees, although even this would have given her something very short of absolute or fee simple title. It is a case in which she, in exercising her power as donee, may do so only for the benefit of the class of proper appointees so described by her father, with no thought that she would make an appointment or a series of appointments, each one in turn to be ruled out by the trustees until one appointee happened to avoid the limitations.

This provision of the trust deed requires the trustees to pay the income to such person or persons as are ap-

pointed to receive the income, and, at the termination of the trust, to transfer the property to such person or persons as are appointed to receive the principal. The Circuit Court of Appeals says the trust deed makes no provision controlling the appointee's interest in case he should die intestate. No more does the trust deed make provision controlling the disposition of the appointee's interest in case he should die testate. In fact, no provision is made as to what should happen in case the appointee should die before coming into the enjoyment of the appointed property. Does this failure to include such a provision make the appointee any less a "beneficiary" within the meaning of Item 15? (R. 26.)

If the appointee should die before coming into the enjoyment of the appointed property, regardless of whether it should be held that the appointed property should then be paid to his legatee if testate, or his issue or heirs if intestate, or be held to lapse and the property be required to be distributed among the remaining parts, the appointee would nevertheless be a beneficiary within the meaning of the law and the intent of the will and deed of trust. His legatees, heirs, issue or the beneficiaries of the remaining parts respectively, as the case might be, would take his place as beneficiaries under the trust deed within the meaning of Item 15. At the time of distribution, on the termination of the trust, a duty will devolve upon the trustees to determine in each case, in order to carry out the purpose of the trustor, as set forth in the preamble of the trust deed, and in Items 15 (R. 26) and 26 (R. 61) thereof, whether the beneficiary, however designated, is worthy.

An examination of the trust deed reveals that Isaac Stephenson used the word "beneficiary" in only four items of his will, including Item 15. The other items are Items 12 (R. 26), 18 (R. 28) and 23 (R. 32). We find no express provision of the creator of the powers in any of these items, or anywhere in the deed, distinguishing between

beneficiaries named by him and appointees named by his donees. There are no reasons for believing that he intended to distinguish between the beneficiary named by him and the beneficiary (appointee) named by his donee, in addition to the fact that no such provision is made in the trust deed.

The trust was to continue for twenty-one years after the death of the grantor and his wife, and, as his children were all given powers of appointment, the grandchildren would not be protected in the manner contemplated by him unless the appointees were included in Item 15, since the children who were donees of the powers could appoint their own children, or as to those who had none, their brothers and sisters, or their nephews and nieces.

We discuss below the provisions of the deed of trust to which the Circuit Court of Appeals refers as indicating an intention to differentiate between beneficiaries and appointees precluding the inclusion of the latter among the former for purposes of Item 15.

We understand the theory of the Court on this point to be that if a donee who, of course, is a named beneficiary, one of trustor's children, should be found unworthy and die, exercising his power of appointment, the withheld property could not be paid to the appointee, as such, since by the deed such trust property must be paid to the donee's issue as such. Insofar as there is this limitation on the exercise of the power, supporting our contention that it is a special power, we should not object. We think this fault appears in the argument of the Court: it fails to distinguish between an effective and an ineffective appointment. Of course, the appointee under an ineffective appointment could never be a beneficiary under such appointment. Thus, a named beneficiary who dies before the trust terminates, could only have had income withheld. Such accumulated income is the withheld property which must be paid to his issue, or, if none, be distributed among

the other parts. The principal and subsequent income of his trust part was never property which the trustees could have paid to him and so could not be as to him "withheld property." Principal could not be withheld until the time for distribution arrives and the distributee is known. Until the distributee is known, the trustees could not determine whether he is worthy or unworthy. Therefore, the appointee of such donee will take the property included in the trust part appointed, being income after the appointment and principal, but withheld property, being income before the appointment, will go to the issue of the donee, and, in default of issue, to the other parts. To say that an appointee cannot be a "beneficiary" as to property withheld from him, is not to say that he cannot be a beneficiary with respect to property as to which the appointment takes effect. As will be noted, even as to withheld property, if the unworthy beneficiary leaves no issue, such withheld property goes to the other remaining parts, the beneficiaries of which may be the appointees of worthy beneficiaries. So, whether or not the trustor eliminated the appointees to withheld property yet he did not exclude them as to property with respect to which the appointment takes effect.

The Circuit Court of Appeals says that when a named beneficiary dies intestate, the trust deed provides that income shall be paid to issue then surviving, and, at the termination of the trust, the trustees shall transfer all property then in their possession to then surviving issue. The Court evidently refers to the provisions of the deed corresponding to the fourth paragraph of Item 10 of the Trust Deed (R. 23, 24) providing for the contingency of death. It will be noted that by the proviso contained in this paragraph, if there should be no issue the income and property is to be distributed equally among all the other then existing remaining parts.

III.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment.

The intention of Isaac Stephenson controls over any definition or technical words in the instruments before the Court.

The value of the property passing under the powers of appointment exercised by Mrs. Morgan cannot be included in her estate for taxation (Sec. 302(f) Revenue Act) unless the power is a general power of appointment.

The powers are not general powers of appointment unless Isaac Stephenson *intended* to grant to his daughter as donee a general power of appointment.

The intention of the testator or trustor must be ascertained from the language of the instruments.

"Powers are to be construed in accordance with the intention of the donor or grantor, as determined

under the rule relating to the construction of instruments generally." 49 C. J. p. 1260.

"A power cannot be extended beyond its express terms, *and the clear intention of the donor.*" Ibid. (Italics ours.)

The Circuit Court of Appeals recognized this rule of law, but contented itself with simply examining the alleged intention of the testator not to limit the general power of appointment, which the Court concluded he had created. (R. 118, 119, 120, 121.)

Petitioner urged before the Circuit Court of Appeals that the Court should examine the intention of the testator to ascertain whether he intended to give his daughters, donees under the powers, absolute power of disposition over the property.

In *Smith v. Bell*, 6 Pet. 68, 75, Chief Justice Marshall said:

"The first and great rule in the exposition of wills to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

This Court has also held that the same rule applies to the construction of trusts. *Green v. Green*, 90 U. S. 486.

The petitioner has assigned for error in this record that the Circuit Court of Appeals did not, as was held necessary in *Hepburn v. Commissioner*, 37 B. T. A. 465, ascertain the intention of the testator, "which is controlling" to create a general or a limited power of appointment.

Petitioner requested the Circuit Court of Appeals to hold that the first paragraph in the deed of trust (R. 13) and in the will (R. 38), together with other provisions

relating to the powers of the trustees and their control over the property showed his desire (*Hepburn v. Commissioner*, 37 B. T. A. 466) that his children should not have any ownership of or control over his property. He clearly indicated thereby his intention that they should not be given absolute powers of disposition such as they would legally have under general powers of appointment. The Circuit Court of Appeals, however, did not in its opinion even refer to this argument.

The fact that Isaac Stephenson in his will and deed of trust used the technical words, "to such person or persons as she may appoint" (R. 19) which may have a definite legal signification, does not bar the petitioner here from the right to have the due consideration of the Court to the evidence of the testator's (trustor's) intention not to employ the words or terms in their technical sense. If that intent does appear from the instruments, it is the duty of the Court to construe the words not in their technical sense but so as to effectuate his intention. 69 C. J. 76; *Lyons v. Lyons*, 233 F. 744, 746.

If it should be held that petitioner is foreclosed from showing the intent of the testator (trustor), on the ground that his intent is immaterial, inasmuch as the words used by him have a definite legal meaning which cannot be changed by his intent, then such a holding would be in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Circuit Court of Appeals for the Seventh Circuit held that if a regulation promulgated by the Commissioner of Internal Revenue should be construed by a Court to make an irrebuttable presumption by means of an absolute prohibition of testimony relevant and pertinent to the factual issue, such a construction would

violate the due process clause of the Fourteenth Amendment. (*Commissioner v. Shattuck*, 97 Fed. (2d) 790. Citing *Heiner v. Donnan*, 285 U. S. 312.

(4) The Circuit Court of Appeals should not have limited its examination into the intent of the testator purporting to support its finding that the powers were general, and should have ascertained his intent not to grant a general power.

The result of the Court's examination is shown in its opinion (R. 118, 119, 120, 121). The Court finds that "the decedent's father intended to differentiate between beneficiaries under his will and deed and appointees under the wills of his children, to whom he granted powers of appointment." (R. 119.) The Court also finds (R. 121) that "the testator evidenced no intention of controlling whatever property passed to any appointees."

The Court reaches the astonishing conclusion that Isaac Stephenson, while using every means within his power to prevent his estate from being dissipated by his children, grand-children, and other relatives, was perfectly willing to have his estate dissipated by unworthy or spendthrift appointees! The very statement of the proposition is its own refutation.

A painstaking effort was made by the respondent to differentiate between "beneficiaries" and "appointees," as a basis of his argument that the donee held general powers of appointment. It is well settled in law that an "appointee" under a power of appointment and will is also a "beneficiary" under the will of the donor. (69 C. J. 851 (Sec. 1961)). *Lederer v. Pearce*, 262 Fed. 993, 997; affirmed 266 Fed. 497.

IV.

The reservation by Isaac Stephenson to himself in his will and deed of trust of the right to name the line of descent if donee should fail to exercise the power, stamped such power as a special power because it embraced an interest less than a fee.

In the deed of trust of Isaac Stephenson (R. 19), he provided that in the event Elizabeth S. Morgan should fail to appoint, or in making the appointment, should fail to dispose of the entire income and principal of her share of the trust estate, then the trustee should pay such annual income and principal to the issue of his said daughter. A like provision is made in Item 15 of the will of Isaac Stephenson (R. 49).

In *Cawker v. Dreutzer*, 197 Wis. 98, the provision was practically the same. The Court said in its opinion (p. 133), in speaking of the testator:

"He desired to put the corpus beyond the reach of such legatees, so that they might have an assured income for life. *So he tried to put it beyond their power to dispose of the estate during their life.* While he gave an absolute power of appointment, he reserved to himself the naming of the line of descent, should they fail to exercise the power, and thus gave to appellant a vested remainder, subject to be defeated only by the exercise of the powers of appointment." (Italics ours.)

V.

There is no valid federal definition nor standard of general powers of appointment.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulation 80, is inoperative.

Treasury Regulation 80 (124) reads as follows:

***"Ordinarily, a general power is one to appoint any person or persons in the discretion of the donee of the power."* (Italics ours.)**

This regulation purports to give the definition of "general powers of appointment," but it applies only to cases "ordinarily" coming before the courts. In Webster's dictionary, the word "ordinarily" is said to mean "customarily" or "usually." By its terms, then, it is clear that the regulation does not purport to apply to *all* cases coming within its scope. No rule is laid down by the regulation as to what proportion of the cases it will apply, and no rule is established therein for "unordinary" or "unusual" cases.

Regulation 80 cannot be held to fulfill the requirements of a statutory standard or definition. It is not even a valid administrative interpretation. Public statutes must be universal, according to Blackstone (25 R. C. L. 763). "A statute cannot be vague. It must be clear, certain, definite and specific." (59 C. J. 601.)

Great Lakes Hotel Co. v. Commissioner, 30 F. (2d) 1.

Regulation 37, at the time of its promulgation in 1919, was in identical language as Regulation 80 except that the word "ordinarily" was not in Regulation 37. The inclusion of that word in the regulation in 1924, must have been occasioned by the Commissioner's awareness of the impossibility of making a definite, certain and universal definition of a general power of appointment which would control every case, and construe properly the many and diverse provisions in the countless wills and trusts coming before the Courts for construction. But he did not cure the defect of indefiniteness and uncertainty and lack of universal application arising from the very words of the regulation.

(2) The decisions of various courts of appeals of the United States purporting to declare a general usage or common law definition of general powers of appointment, followed by the Circuit Court of Appeals in the instant case, are not authority in this case.

Those cases are:

Johnstone v. Comm'r., 76 Fed. 2d. 55 (Ninth Circuit).

Wear v. Comm'r., 65 Fed. 2d, 665 (Third Circuit).

Lee v. Comm'r., 57 Fed. 2d, 399 (Dist. Col.).

Stratton v. U. S., 50, Fed. 2d, 48 (First Circuit).

Fidelity-Philadelphia Trust Co. v. McCaughn, 34 Fed. 2d, 600 (Third Circuit).

They are not authority because there is no common law of the United States. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78.

All those decisions attempt to give a definition of "general powers of appointment." They are all based upon

either state decisions or textbooks, which announce the "general usage" or common law.

In *Erie R. Co. v. Tompkins*, *supra*, this Court overruled *Swift v. Tyson*, 16 Pet. 1, 18, which held that federal courts were "free to exercise an independent judgment as to what the common law of the State is—or should be." The Court in *Erie v. Tompkins* further declared (p. 71): "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, * * *. And no clause in the Constitution purports to confer such a power upon the federal courts."

VI.

The Circuit Court of Appeals erred in not holding as retroactive and void the Revenue Act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment by the decedent as donee.

Isaac Stephenson's will was signed June 15, 1916. His deed of trust was executed May 12, 1917. The first federal revenue act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment, became a law in February, 1919.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its discretionary power of review by writ of certiorari, under the

circumstances and for the reasons stated in the petition and argument; that the petition should be granted in the interest of petitioner, the public, and the prompt and proper administration of justice.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF FOR J. EARL MORGAN, EXECUTOR OF THE
ESTATE OF ELIZABETH S. MORGAN, DECEASED,
PETITIONER.**

BRODE B. DAVIS,
ARTHUR M. KRÄCKE,
Counsel for Petitioner.

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Specification of Errors	9
Summary of Argument	12
Argument	18

I.

The law of the State of Wisconsin, in which State is situated the property affected by the powers here involved, determines whether such powers are general powers of appointment, and such determination is binding on the Federal Courts and the taxing power of the United States. It is not a question of federal law	18
---	----

A.

The Circuit Court of Appeals held in the instant case that the federal law controls and not the law of the State, and that the powers of appointment in question are general powers under the federal law.....	18
--	----

II.

Section 302 (f) Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932 provides that in the gross estate of the donee of a general power of appointment must be included all property passing from such donee by the exercise of said power	28
---	----

III.

The Statutes of the State of Wisconsin define general and special powers

IV.

The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers

V.

By the Statute of Wisconsin an absolute power of disposition not accompanied by a trust given to the owner of an estate for life or for years shall be changed into a fee. * * * Under the negative meaning applicable to these affirmative words, this provision must be construed to mean that when such a power is accompanied by a trust, the estate shall not be changed into a fee

VI

The decision of the Supreme Court of Wisconsin in *Cawker v. Dreutzer*, holding that a power of appointment in that case was a special power, is not, as urged by respondent and as declared in the opinion of the Board of Tax Appeals, a dictum. The Wisconsin Court's decision on that question was absolutely necessary to a determination of the very issue in that case

VII.

The powers in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments granting to the trustees at their discretion the right to annul any appointment made by the donee. These restrictions stamp the powers of appointment as special powers.....

37

VIII.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson

44

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.....

44

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition

44

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment.....

44

IX.

There is no valid federal definition nor legal standard of a general power of appointment; and there being also no binding decisions of federal courts defining powers of appointment there is consequently no federal law on that subject..... 49-50

A.

- (1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment..... 49
 - (a) The attempt to establish this definition and create a legal standard by promulgation of Regulations 37 and 80 is unavailing 49
 - (b) Even if it be held in this case that the law of the State controls only when the federal taxing act by express language or necessary implication makes it dependent upon the State law, the law of the State of Wisconsin must still be resorted to to ascertain the meaning of a general power of appointment in that State because there is no valid federal definition of that term 49-50
- (2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, such definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States 50, 55

X.

The will of Isaac Stephenson was dated June 15, 1916. The deed of trust was executed May 12, 1917, and the fee to the property in question here was deeded to the trustees by him on the same date. Isaac Stephenson died March 15, 1918. The earliest federal revenue act in which property passing under the exercise of powers of appointment was taxed was enacted February 24, 1919. The attempt here to tax in the estate of Elizabeth S. Morgan the value of the property passing under the power of appointment to her, if held to be legal, is so arbitrary and capricious as to amount to a confiscation and offend the 5th Amendment....	56
Conclusion	56

TABLE OF AUTHORITIES CITED.

Bank of America v. Commissioner, 90 Fed. (2d), 981, 983	20, 21, 22, 23
Blackburne v. Brown, 43 Fed. (2d) 320	28
Blair v. Commissioner, 300 U. S., 5, 9, 10.....	12, 23, 24, 25, 26
Bradbury v. Jackson, 97 Me., 449; 54 Atl., 1068.....	32
Burnet v. Harmel, 287 U. S., 103, supra.....	10, 20, 21, 22, 25, 54
Cawker v. Drentzer, 197 Wis., 98	6, 7, 8, 11, 14, 15, 30, 31, 33, 34, 36, 44, 46
Commissioner v. Shattuck, 97 Fed. (2d), 790.....	51
Erie R. R. Co. v. Tompkins, 304 U. S., 64, 78.....	10, 55
Fidelity Trust Co. v. McCaughn, 1 Fed. (2d), 987, 988	46
Fidelity-Philadelphia Trust Co. v. McCaughn, 34 Fed. (2d), 600	55
Freuler v. Helvering, 291 U. S., 35, 43, 45.....	12, 24, 25, 26

*TABLE OF AUTHORITIES CITED (continued).

Gould v. Gould, 245 U. S., 151	27
Graham v. Commissioner, 95 Fed. (2d) 174	54
Great Lakes Hotel Co. v. Commissioner, 30 Fed. (2d), 1	53
Green v. Green, 90 U. S., 486, 490	48
Heiner v. Donnan, 285 U. S., 312	47
Helmholz v. Commissioner, 28 B. T. A., 165; 37 B. T. A., 459, 465; B. T. March 15, 1938, Docket No. 82242	12, 27
Hepburn v. Commissioner, 37 B. T. A., 459	15, 37, 38, 46, 47, 48
Johnstone v. Commissioner, 76 Fed. (2d), 55.....	10, 28, 55
Kendrick, Christine Smith, et al., Executrices, 34 B. T. A., 1040, 1044	8, 12, 27
Lang v. Commissioner, 304 U. S., 264 (1938); C. C. H. Board of Tax Appeals Service (1938), Vol. 4, page 9819	12, 21, 22, 25, 26
Lederer v. Pearce, 262 Fed., 993, 997; Affirmed, 266 Fed., 497	44
Lee v. Commissioner, 57 Fed. (2d), 399	55
Leser v. Burnet, 46 Fed. (2d), 756, 758.....	6, 8, 12, 18, 20, 38
Lyeth v. Hoey, 305 U. S., 188	11, 25, 26
Lyons v. Lyons, 233 Fed., 744, 746	46
Manhattan General Equipment Co. v. Commissioner, 297 U. S., 129, 134	50
Marbury v. Madison, 1 Cranch, 137, 174	33
Morgan, J. Earl, Executor v. Commissioner, 103 Fed. (2d), 636; 36 B. T. A., 588	1, 7, 8, 12, 27
Nichols v. Coolidge, 274 U. S., 531, 542	17, 56

TABLE OF AUTHORITIES CITED (continued).

Old Colony Trust Co. v. Commissioner, 73 Fed. (2d), 970	28
Poe v. Seaborn, 282 U. S., 101	12, 23, 25, 26
Roberts v. Roberts, 102 Md., 131; 62 Atl., 161; 1 L. R. A., N. S., 782	31
Sharp v. Commissioner, 303 U. S., 624 (1938); 91 Fed. (2d), 802	12, 24, 25, 26
Shepherd Estate of Frederick v. Commissioner, 39 B. T. A.—(5) (Jan. 1939), C. C. H. Board of Tax Appeals Service (1938) (p. 27950)	12, 27
Smith v. Bell, 6 Pet., 68, 75	48
Stratton v. United States, 50 Fed. (2d), 48	55
Swift v. Tyson, 16 Pet., 1, 18	55
Thompson v. Garwood, 3 Whart. (Pa.), 287	36
Tyler v. United States, 281 U. S., 497	12
United States v. Cambridge Loan & Building Co., 278 U. S., 55	54
Wear v. Commissioner, 65 Fed. (2d), 665	55
Whitlock-Rose v. McCaughn, 15 Fed. (2d), 591-592; 21 Fed. (2d), 164	12, 19, 20, 29
Wurlitzer v. Commissioner, 81 Fed. (2d), 971	54

STATUTES CITED.

Sec. 22(b), (3) of Revenue Act of 1932.....	26
Sec. 232.05, Wisconsin Statutes.....	13, 14, 30, 31, 32
Sec. 232.06, Wisconsin Statutes.....	13, 14, 30, 31, 32
Sec. 232.08 Wisconsin Statutes.....	14, 32, 33
Sec. 240. (a), Judicial Code, as amended by Act of February 13, 1925, Chap. 229, Par. 1, 43 Stat., 938 (Title 28, U. S. C. A., Sec. 347).....	2
Sec. 302 (f) Revenue Act 1926, as amended by Sec. 803(b) Revenue Act 1932.....	5, 6, 10, 13, 16, 25, 27, 28, 33, 47, 54
Sec. 803 (b) Revenue Act 1932; 26 U. S. C. A., Sec. 411.....	5

TEXT BOOKS.

California Civil Code, Sec. 161(a).....	20
49 Corpus Juris, p. 1260.....	47, 51
59 Corpus Juris, p. 601.....	53
69. Corpus Juris, p. 76, p. 851; Sec. 1961, p. 833.....	44, 46, 47, 52
52 Harvard Law Review, 929, 938 (April, 1939).....	53
H. R. Report, No. 767; 76 Cong. 2d Sess. (1918), 21-22.....	29
Hughes on Federal Death Tax, p. 40, Sec. 18.....	51
21 Ruling Case Law, Sec. 3, p. 774.....	36
23 Ruling Case Law, p. 511.....	31
25 Ruling Case Law, p. 763.....	53
Paul Selected Studies in Federal Taxation, Second Series (p. 12).....	27

IN THE
• SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR J. EARL MORGAN, EXECUTOR OF THE
ESTATE OF ELIZABETH S. MORGAN, DECEASED,
PETITIONER.

Opinions Below.

The opinion of the Circuit Court of Appeals appears at Page 112 of the Record and is reported in *Morgan v. Commissioner*, 103 Fed. (2d) 636. The opinion of the Board of Tax Appeals appears at Page 91 of the Record and is reported in *Morgan v. Commissioner*, 36 B. T. A. 588.

Jurisdiction.

The opinion of the Circuit Court of Appeals was entered on April 22, 1939. The petition for writ of certiorari filed by J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, was granted by this Court on October 9, 1939. The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals on a writ of certiorari is conferred by Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, Par. 1, 43 Stat. 938 (Title 28, U. S. C. A. Sec. 347).

Statement of the Case.

The petitioner, on January 23, 1936, filed his petition with the Board of Tax Appeals (R. 2), praying for a redetermination of a deficiency which resulted from the inclusion by the Commissioner, in the value of the gross estate of said decedent, of the value of certain property in respect of which the decedent held powers of appointment, which powers she had exercised by her last will and testament.

Elizabeth S. Morgan died May 3, 1933, a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, Wisconsin. She left a will (R. 79) which was admitted to probate in the County Court of Winnebago County, Wisconsin, and J. Earl Morgan, petitioner, her husband was duly appointed executor thereof (R. 75).

Isaac Stephenson, the decedent's father, died March 15, 1918, leaving a will dated June 15, 1916 (R. 38) and three codicils (not bearing on this case), the will creating a trust (R. 41) for the benefit of decedent and other beneficiaries. The will and codicils were admitted to probate in the County Court of Marinette County, Wisconsin, on May 7, 1918 (R. 76). In his will the testator directed

the trustees under the testamentary trust created in his will to divide his trust estate into nine equal parts, one for each child and testator's widow, respectively. He provided that his daughter, Elizabeth S. Morgan, should receive from his trustees one-fourth of her part of his trust estate, at the end of four, eight, twelve and sixteen years, respectively, after his death (R. 48, 49). She duly received such one-fourth of her part at the end of four, eight and twelve years, respectively. She died before the expiration of sixteen years after her father's death, and respondent for the purpose of this assessment of the estate tax included the last one-fourth of her part of the said testamentary trust estate in her gross estate (R. 11).

Isaac Stephenson, by his will, gave to the appointee or appointees of his said daughter, to be appointed by her will, all the property remaining in her part of the trust estate at her death (R. 49). She exercised the above power by appointing in her will, her husband, J. Earl Morgan (R. 82), to receive during his lifetime the income of all the property in her part of the estate of her father remaining in the hands of his trustee at the time of her death.

The will of Isaac Stephenson further provided, that should his daughter, Elizabeth S. Morgan, die without issue without having by her will appointed a person or persons to receive her part of the property remaining in her father's testamentary trust at the time of her death, then her part of the trust estate should cease to exist, and all the property then remaining in such part should be distributed among the existing remaining parts. The testamentary trust under the will of Isaac Stephenson will not be terminated until July 11, 1946—twenty-one years after the death of Martha E. Stephenson, wife of Isaac Stephenson.

4

His will further provided, that if she should die leaving issue, without having appointed such person or persons, then the income from the trust estate should be used by the trustees for the support of such issue, and upon the termination of the trust the principal should go to such issue, *per stirpes* (R. 49).

Isaac Stephenson on May 12, 1917, also executed a deed of trust (R. 13) which by its terms was to terminate twenty-one years after the death of the trustor and his wife (R. 13). Isaac Stephenson died March 15, 1918. His wife, Martha E. Stephenson, died July 11, 1925. The deed of trust provided that Elizabeth S. Morgan, after the death of her father, should receive the income from a specified part of the trust property to be set apart for her by the trustees of the trust estate. If she should be living at the termination of the trust, she was to receive all of such part of such trust estate then in the possession of the trustees (R. 18). The deed of trust further provided that should she die prior to the termination of said trust, the trustees should pay the income from her part of the trust estate to the person or persons whom she might appoint by her last will and testament to receive such income during the term of the trust, and the principal upon the termination of the trust (R. 19).

The powers of appointment in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments, as follows:

Item 15 of the deed of trust (R. 26) and Item Twenty-Six of the will (R. 61) provide that whenever in the judgment of the Trustees, the trust property going to any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for*

any other reason or reasons, the trustees shall withhold, in their judgment, from any such beneficiary, the whole or any part of said trust property, whether income or corpus. (Emphasis ours.) The above language applies to any appointee under the exercise of the powers of appointment, such appointee being a beneficiary. By her will (R. 84, 85) Elizabeth S. Morgan exercised the above power of appointment by appointing her husband, J. Earl Morgan, to receive during his lifetime the income of all the property embraced within the power, he to pay out of such income the sum of Two Hundred (\$200.00) Dollars per month to decedent's daughter during the continuance of the trust and after his death the principal to go to certain of her relatives.

The Commissioner for the purpose of assessment of the estate tax, included in the value of her gross estate the value of all the property passing under her exercise of said powers of appointment (R. 11).

The Commissioner's action was based upon the following provisions of the Revenue Act of 1926, as amended by Sec. 803(b) of the Revenue Act of 1932, 26 U. S. C. A. Sec. 411:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . .

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ."

A Stipulation of Facts (R. 75-78) was filed in the case. The principal question in dispute before the Board of Tax Appeals and the Circuit Court of Appeals was whether the

powers of appointment under the deed of trust and the will of Isaac Stephenson are general powers of appointment, and the value thereof properly included under the provisions of Section 302(f) of the Revenue Act in the gross estate of Elizabeth S. Morgan. If those powers of appointment are general powers, under the terms of the will and deed of trust as construed by the law applicable thereto, then the value of the property passing by the exercise of such powers may be included in the value of her gross estate for taxation. If the powers as so construed are not general powers of appointment, the value of the property so passing cannot be so included.

The petitioner urged upon the Board of Tax Appeals that the law applicable to this case in determining the nature and extent of the powers of appointment is the law of Wisconsin, the state in which the property embraced in the power of appointment is situated and in which the donor and donee resided and the petitioner now resides. In support of his argument, petitioner cited the case of *Leser v. Burnet*, 46 F. (2d) 756, in which the Circuit Court of Appeals of the Fourth Circuit held that the law of the state having jurisdiction over the property should be looked to to determine the nature and extent of powers of appointment; and that under the law of Maryland the power of appointment was not a general power and the Commissioner of Internal Revenue could not include for taxation the value of the property in the gross estate of the decedent.

Relying upon that principle of law, petitioner cited to the Board of Tax Appeals the decision of the Supreme Court of Wisconsin in *Cawker v. Dreutzer*, 197 Wis. 98. That case involved a will and a testamentary trust concerning property located in the State of Wisconsin, in which will the powers of appointment were created by

words almost identical with the words used in the Stephenson will and deed of trust. The appointing power to Elizabeth S. Morgan in the Stephenson will (R. 49) is as follows, viz: "To the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament," and in the Stephenson deed of trust is in the following words, viz: "To such person or persons as she may appoint by her last will and testament." (R. 19.) The Supreme Court of Wisconsin held that those words did not create a general power of appointment in Wisconsin. The respondent did not contend before the Board of Tax Appeals that the federal law controlled; but acquiesced in the rule that the law of Wisconsin controlled. He insisted, however, erroneously, that the facts in the *Cawker* case differed from the facts in the instant case; that the donees of the power in the *Cawker* case were not possessed of the immediate life estate as was Elizabeth S. Morgan in the instant case. He urged, accordingly, that the *Cawker* case was not an authority in the case at bar. The fact is however that the holders of the life estates in the *Cawker* case were also the donees of the powers of appointment. The facts were, therefore, exactly similar in the *Cawker* case and the *Stephenson* case here.

Furthermore, the respondent, still conceding the rule that the law of Wisconsin controls, attacked the authority of *Cawker v. Dreutzer* as a holding. He argued to the Board, also erroneously, as we will show later, that the question of the effect of the power of appointment was not before the Wisconsin court in that case (R. 95, 96). Respondent accordingly insisted that the decision of the Supreme Court of Wisconsin was *dictum*.

The decision of the Board of Tax Appeals was rendered September 30, 1937 (R. 91; 36 B. T. A. 588). In its opin-

ion the Board said, in stating the rule of law applicable to the case (R. 94):

"It has been held that in determining the nature and effect of powers, we look to the law of the state having jurisdiction. *Leser v. Burnet*, 46 F. (2d) 756; *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040, 1044."

That portion of the syllabus in *J. Earl Morgan, Executor, v. Commissioner*, 36 B. T. A. 588, immediately following the statement of facts, reads: "Held, under the *applicable law of the State of Wisconsin, etc.*" (Italics ours.)

The Board of Tax Appeals held that the case of *Cawker v. Dreutzer*, 197 Wis. 98, cited to the Board by petitioner as declaring the law of Wisconsin, was *dictum*; that the question of the nature and effect of the powers of appointment was not before that Court, and its decision was not authority (R. 95, 96)—thus adopting the contention of the respondent. The Board accordingly held that the powers were general powers of appointment and sustained the determination of the Commissioner.

The petitioner filed his petition for review in the United States Circuit Court of Appeals for the Seventh Circuit, and with it he filed various assignments of error (R. 103, 104). The petitioner made the same legal contentions before the Circuit Court of Appeals that he had made before the Board. *The respondent, however, presented an argument exactly contrary to his argument before the Board.* He told the Circuit Court of Appeals that the federal law controlled and not the law of Wisconsin, as he had contended before the Board, and as the Board had held was the applicable law.

The Circuit Court of Appeals entered judgment affirming the decision of the Board of Tax Appeals, but upon an entirely different principle of law than the Board had an-

nounced. The Circuit Court of Appeals held that the federal law controlled and under the federal law the powers of appointment in the will and deed of trust were general powers.

Specification of Errors.

The petitioner assigns as error the following acts and omissions of said United States Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in affirming the decision of the United States Board of Tax Appeals which affirmed the determination by the Commissioner of Internal Revenue of the alleged deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan.

2. The Circuit Court of Appeals erred in sustaining the action of the Commissioner of Internal Revenue in including, in the value of the gross estate of Elizabeth S. Morgan, for federal tax purposes, the value of property passing under decedent's exercise of the powers of appointment.

3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the State of Wisconsin and the decision of the Supreme Court of that State to the contrary, are immaterial.

4. The Circuit Court of Appeals erred in failing to ascertain from said will and deed of trust the intention of Isaac Stephenson not to create therein general powers of appointment.

5. The Circuit Court of Appeals erred in not holding that the intention of Isaac Stephenson not to create general powers of appointment in said will and in said deed

of trust was controlling over any language used by him in said instruments pertaining to powers of appointment.

6. The Circuit Court of Appeals erred in failing to hold that the powers of appointment in the will and deed of trust were restricted by the authority given to the Trustees to withhold property from unworthy beneficiaries, thereby annulling any appointment made by the donee; and that therefore the donee did not have an unfettered, general power of appointment.

7. The Circuit Court of Appeals erred in holding that the appointees under the exercise of the powers of appointment by Elizabeth S. Morgan were not included within the term "beneficiaries" in the will and deed of trust; and also erred in holding that her power to appoint unworthy appointees was not restricted.

8. The Circuit Court of Appeals erred in accepting as a definition "uniformly recognized by Federal Courts" (R. 114, 115), the common law definition of a general power as pronounced by the Circuit Court of Appeals of the Ninth Circuit in *Johnstone v. Commissioner*, 76 F. (2d) 55, because there is no federal general common law. *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 78.

9. The Circuit Court of Appeals erred in holding that even though under the law of Wisconsin the powers in the will and deed of trust were special powers, such fact was immaterial because the power in the Stephenson instruments satisfies the definition of a general power of appointment as that term is used in Sec. 302 (f) (R. 115, 116).

10. The Circuit Court of Appeals erred in holding that the decision in the case of *Burnet v. Harmel*, 287 U. S. 103, was applicable to this case.

11. The Circuit Court of Appeals erred in holding that the case of *Lyeth v. Hoey*, 305 U. S. 188, was applicable to this case.

12. The Circuit Court of Appeals erred in holding the case of *Cawker v. Dreutzer*, 197 Wis. 98, to be *dictum*.

13. The opinion of the Circuit Court of Appeals and its decision entered pursuant thereto are not supported by the facts in this case or the law applicable thereto.

14. The Circuit Court of Appeals erred in entering judgment affirming the decision of the United States Board of Tax Appeals, which affirmed the determination by the Commissioner of Internal Revenue of a deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan, deceased.

SUMMARY OF ARGUMENT.

I.

The law of the State of Wisconsin, in which State is situated the property affected by the powers here involved, determines whether such powers are general powers of appointment, and that determination is binding on the Federal Courts and the taxing power of the United States. It is not a question of federal law.

A.

The Circuit Court of Appeals held that the federal law controls and not the law of the State, and that the powers of appointment in question are general powers under the federal law.

Leser v. Burnet, 46 Fed. (2d) 756.

Whitlock-Rose v. McCaughn, 21 Fed. (2d) 164.

Lung v. Commissioner, 304 U. S. 264.

Sharp v. Commissioner, 303 U. S. 624.

Blair v. Commissioner, 300 U. S. 5.

Freuler v. Helvering, 291 U. S. 34, 35.

Poe v. Seaborn, 282 U. S. 101.

Tyler v. U. S., 281 U. S. 497.

Helmholz v. Commissioner, 28 B. T. A. 165.

Kendrick v. Commissioner, 34 B. T. A. 1040.

J. Earl Morgan, Executor v. Commissioner, 36 B. T. A. 588 (1937).

Estate of Frederick Shepherd v. Commissioner, 39 B. T. A.—(5) (Jan. 1939); C. C. H. Board of Tax Appeals Service (1938) (p. 27950).

II.

Section 302 (f) Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932 provides that in the gross estate of the donee of a general power of appointment must be included all property passing from such donee by the exercise of said power.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or in money's worth."

III.

The Statutes of the State of Wisconsin define general and special powers.

Wisconsin Statute (1935):

"232.05 General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special Power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made

are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

IV.

The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers.

Section 232.05 and Section 232.06 of the Wisconsin Statutes (1935).

Cawker v. Dreutzer, 197 Wis. 98.

V.

By the Statute of Wisconsin an absolute power of disposition not accompanied by a trust given to the owner of an estate for life or for years shall be changed into a fee. * * * Under the negative meaning applicable to these affirmative words, this provision must be construed to mean that when such a power is accompanied by a trust, the estate shall not be changed into a fee. This provision is as follows:

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts."

VI.

The decision of the Supreme Court of Wisconsin in *Cawker v. Dreutzer*, holding that a power of appointment in that case was a special power, is not, as urged by respondent and as declared in the opinion of the Board of Tax Appeals, a dictum. The Court's decision on that question was absolutely necessary to a determination of the very issue in that case.

Cawker v. Dreutzer, 197 Wis. 98.

VII.

The powers in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments granting to the trustees at their discretion the right to annul any appointment made by the donee. These restrictions clearly stamp the powers of appointment as special powers.

Hepburn v. Commissioner, 37 B. T. A. 459.

VIII.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from the instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment.

IX.

There is no valid federal definition nor legal standard of a general power of appointment; and there being also no binding decisions of federal courts defining powers of appointment there is consequently no federal law on that subject.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulations 37 and 80 is unavailing.

(b) Even if it be held in this case that the law of the State controls only when the federal taxing act by express language or necessary implication makes it dependent upon the State law, the law of the State of Wisconsin must still be resorted to to ascertain the meaning of a general power of appointment in that State because there is no valid federal definition of that term.

(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, such definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.

X.

The will of Isaac Stephenson was dated June 15, 1916. The deed of trust was executed May 12, 1917, and the fee to the property in question here was deeded to the trustees by him on the same date. Isaac Stephenson died March 15, 1918. The earliest federal revenue act in which property passing under the exercise of powers of appointment was taxed was enacted February 24, 1919. The attempt here to tax in the estate of Elizabeth S. Morgan the value of the property passing under the power of appointment to her, if held to be legal, is so arbitrary and capricious as to amount to a confiscation and offend the 5th Amendment.

Nichols v. Coolidge, 274 U. S. 531, 542.

ARGUMENT.**I.**

The law of the State of Wisconsin, in which State is situated the property affected by the powers here involved, determines whether such powers are general powers of appointment, and such determination is binding on the Federal Courts and the taxing power of the United States. It is not a question of federal law.

A.

The Circuit Court of Appeals held in the instant case that the federal law controls and not the law of the State, and that the powers of appointment in question are general powers under the federal law.

In *Leser v. Burnet*, 46 Fed. (2d) 756, the power of appointment was created in an instrument of trust which provided that, upon the decease of the donee, the Trustee was to hold the property in trust for the use of "such person or persons as she by her last will and testament . . . shall have appointed to take the same." The donee duly exercised the power of appointment by her will. The Board of Tax Appeals affirmed the determination of the Commissioner of Internal Revenue including, for the purpose of taxation of the estate of the decedent donee, the value of the property passing under the exercise of her power of appointment. The question before the Circuit Court of Appeals for the Fourth Circuit was precisely the same which is presented here, viz: Could the Commissioner lawfully include the value of such property in decedent's estate for purposes of estate taxation? The Court held that

the question whether the power of appointment was a general power was to be determined by the law of Maryland, stating that (p. 760) "we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that State and relating to property there situate." The Court found that it was the settled law of the State that the power in question was not a general power; that under the law of Maryland the donee had no right under the power to exercise it in favor of her creditors, although such right was held in other jurisdictions to be a fundamental element of a general power of appointment. The donee, however, not having that right in Maryland, the power of appointment was special and not general.

The Court therefore held that the Commissioner could not include in the gross estate of the donee of the power, for taxation, the property passing under the power of appointment.

As to the objection urged by the Commissioner, to the Court's holding in that case (p. 761), that its effect "is to destroy the uniformity of operation of the statute, as the language used would unquestionably create a general power in most other States, the court answered: We do not think so. The Revenue Act provides for the inclusion only of property passing under general powers; and if a will or deed, as properly interpreted under the applicable law, creates a power which is not general but special or limited, it does not fall within the meaning of the Act."

The Circuit Court of Appeals in *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164, a case under the same Federal Estate Tax as here held that where the property passing under the power was situated in New Jersey, the law of New Jersey controlled as to whether the power was a general power of appointment.

No application was ever made to this Court for a writ of certiorari to review the decisions of the Circuit Courts of Appeal in *Leser v. Burnet*, and *Whitlock-Rose v. McCaughn*. The decisions stand and have stood ever since their rendition, unquestioned by any decision of this Court.

Notwithstanding these holdings that the local law controls, the Circuit Court of Appeals held in the instant case, under the supposed authority of *Burnet v. Harmel*, 287 U. S. 103, that the law of the State of Wisconsin was immaterial; that the federal law controlled, and that under the federal law the powers of appointment in this case were general powers.

The Circuit Court of Appeals here, much in the same manner as did the Circuit Court of Appeals for the Ninth Circuit in the case of *Bank of America v. Commissioner*, 90 F. (2d) 981 (1937), extended the holding of this court in *Burnet v. Harmel*, *supra*, far beyond the meaning of that decision. In the *Bank of America* case three Judges sat at the hearing out of seven Judges constituting the Court of Appeals for that Circuit. The Court had before it the question as to whether the federal taxing power was bound by the California community property law in determining the nature and ownership of the property, the value of which was sought to be included in the gross estate of the decedent for purposes of estate tax assessment.

In the *Bank of America* case, the decedent and his wife were residents of California. Decedent took out certain policies of life insurance on which the premiums were paid out of community property. California Civil Code, Sec. 161a provides that the respective interests of the husband and wife in community property are present, existing and equal interests. On decedent's death his executor included

in the estate tax return only one-half of the amount of these policies in the gross estate. The Commissioner, however, included the full amount of the policies as being owned by the decedent. Decedent's executor contended that under the California community property law, the wife was the owner of one-half of the proceeds of the insurance policies, and therefore the decedent had no power of disposition or control at his death over the wife's half of such proceeds, and the estate could not be taxed for such half. The majority of the Judges sitting held, under a misapprehension of the meaning of *Burnet v. Harmel, supra*, (1) that the state law could control only when the taxing statute made its operation dependent on state law; (2) that there was nothing to indicate that the taxing statute (Sec. 302 (g)) made its operation dependent on California law; and (3) therefore the federal law controlled on the question as to whether the decedent was the owner of the proceeds of all the life insurance policies. The court therefore held that "the local law is immaterial," (*Bank of America v. Comm'r.*, 90 Fed. 2d, 983) and sustained the Commissioner's determination.

Less than a year subsequent to the above decision, the case of *Lang v. Commissioner*, 304 U. S. 264 (1938) came before the Circuit Court of Appeals for the Ninth Circuit. While that case was pending, three of the seven judges of the court certified propositions of law to this Court (C. C. H., Federal Tax Service (1938) Vol. 4, p. 9819), setting forth that the decision rendered by two of the judges out of three who sat in the case of *Bank of America v. Comm'r.*, *supra*, did not represent the view of the remaining five Judges of the Court. They requested this Court to give instructions to the Circuit Court of Appeals for the proper decision of the case then before it—the *Lang* case. The certificate recited that these two judges had held that the

statutes of California relating to community property could not affect the interpretation of the Revenue Act by the Commissioner.

The facts in the *Lang* case, in which the judges of the Circuit Court of Appeals certified the propositions, were that Lang and his wife lived in the State of Washington (where community law obtains), until his death, at which time certain policies of insurance upon his life were in force. All the premiums upon the policies were paid for from community funds. The Commissioner of Internal Revenue determined that the proceeds from all such policies were part of the insured's gross estate and assessed accordingly. The assessment was upheld by the Board of Tax Appeals.

Pursuant to the certificate of the Circuit Court of Appeals, requesting instructions, this Court in *Lang v. Commissioner*, 304 U. S. 264, instructed the Circuit Court of Appeals that only one-half of the proceeds from the insurance policies became a part of the decedent's gross estate; that the estate could not be taxed for the other half of the proceeds of the policies which was owned by his wife under the provisions of the Community Property Law of the State of Washington. This Court ruled that the state law controlled.

The Circuit Court of Appeals in *Bank of America v. Commissioner, supra*, based its ruling that the local law was immaterial on the supposed authority of *Burnet v. Harmel*, 287 U. S. 103, which had held that the State law controlled only when the taxing statute makes its operation dependent on State law.

This Court, in *Lang v. Commissioner*, 304 U. S. 264, answered the request by the Judges of the Circuit Court of Appeals for instructions, and said that the holding

in the *Bank of America* case, that local law was immaterial, is "not accurate and conflicts with what we have said." (p. 267.)

In *Poe v. Seaborn*, 282 U. S. 101, the question before this Court was as to whether the Commissioner could tax against the husband the entire income received from community property owned by him and his wife in the State of Washington, or whether each should be taxed for one-half of the income on such property. This Court held that whether the interest of the wife in community income is taxable apart from the interest of the husband, was to be determined by the state law of Washington (p. 110), and that under that law the income of only one-half of the property could be taxed to the husband.

Another case in which the Court applied the rule that local law controls is *Blair v. Commissioner*, 300 U. S. 5. In that case a beneficiary under a trust assigned to third persons part of his income from the trust. In a case in a state court construing the will under which the trust was created, the Appellate Court of Illinois held that the trust was not a spendthrift trust and that the beneficiary's assignment was valid. The Commissioner of Internal Revenue contended that, notwithstanding the Court's decision the trust was a spendthrift trust, the assignment was invalid, that it must be ignored, and that the beneficiary was liable for a tax upon the entire income, regardless of the assignment, because he was still the owner of the income, as he had never legally assigned it. This Court held that the decision of the Appellate Court of Illinois was binding upon the Federal taxing power, and that the beneficiary could not be taxed upon the income which he had assigned. The Court said that the question of the validity of the assignment is a question of local law. The beneficiary was

a resident of Illinois and his disposition of the property in that state was subject to its law. "By that law, the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest, in whole or in part, are to be determined. The decision of the State Court upon these questions is final." (p. 9) (Emphasis ours.)

In *Sharp v. Commissioner*, 91 F. (2d) 802, the Circuit Court of Appeals for the Third Circuit sustained an assessment by the Commissioner of Internal Revenue against decedent's estate on property which the Commissioner determined was owned by the decedent at the time of his death. Decedent's executors contested the assessment and claimed that the property was owned by a trust estate created by the decedent. Such ownership had been decided by the decree of a State Court of competent jurisdiction which had held that the decedent did not own the property but that it was owned by the trust estate. The reason given by the Circuit Court of Appeals for sustaining the assessment and disregarding the decision of the State Court, was that the decision was binding only upon distributees of the estate, but it could not bind the taxing power of the Government. On certiorari granted, this Court, in *Sharp v. Commissioner*, 303 U. S. 624 (1938), reversed the decision of the Circuit Court of Appeals, citing *Freuler v. Helvering*, 291 U. S. 35, 43, 45; *Blair v. Commissioner*, 300 U. S. 5, 9, 10.

In *Freuler v. Helvering*, *supra*, this Court held that the decree of a state court holding that annual deductions for depreciation of trust property should have been taken from gross income before making distributions to beneficiaries, establishes the rights of the parties, and

permits deductions from distributable income on account of depreciation. Further, that this order of the state court governed the distribution and was effective to fix the amount of the taxable income of the beneficiaries. The Circuit Court of Appeals held that the decision of the State Court was not conclusive in the administration of the Federal Revenue Act. This Court overruled the Circuit Court of Appeals, and held that the decision of the State Court established the law of California as to the property rights of the beneficiaries; and that it must control in applying an income taxing act (p. 45).

The decisions of this Court in *Lang v. Commissioner*, *Sharp v. Commissioner*, *Poe v. Seaborn*, *Blair v. Commissioner*, and *Freuler v. Helvering*, show the intention of this Court not to have the meaning of its language in *Burnet v. Harmel*, 287 U. S. 103, enlarged beyond the scope intended by the Court in deciding that case on the facts before it.

We contend that the rule announced in the above cases—that the State law controls—is strictly applicable to the instant case, and that the Circuit Court of Appeals erred in holding otherwise.

The Circuit Court of Appeals in the instant case also cited *Lyeth v. Hoey*, 305 U. S. 188, as authority for its holding that the question here was whether the property passed under a general power of appointment within the meaning of Section 302 (f) of the Revenue Act, and that the question was one of federal law (R. 118).

In *Lyeth v. Hoey* the taxpayer was an heir of the decedent whose will had been offered for probate in Massachusetts. The taxpayer began proceedings to contest the probate of the will on certain named ground. A com-

promise agreement was thereupon entered into between the taxpayer and the legatee for the bulk of the estate, by the terms of which compromise the taxpayer received certain cash and property. The Commissioner assessed the value of the taxpayer's receipts under the compromise as income. The taxpayer filed suit for a refund, relying upon Section 22 (b) (3) of the Revenue Act of 1932, which exempts from income tax the "value of property acquired by . . . inheritance" The taxpayer contended that the property he received was within said statutory exemption. The United States Circuit Court of Appeals for the Second Circuit declared the rule to be that whether the property was exempt from such tax depended upon the law of the jurisdiction under which the taxpayer received it; that under the Massachusetts decisions the taxpayer received the property by purchase and not by inheritance, and therefore it was not within the statutory exemption of the Revenue Act. The Supreme Court reversed the judgment of the Circuit Court of Appeals, and held that the application of the Massachusetts rule was erroneous.

An entirely different question was presented in *Lyeth v. Hacy* from the question presented in the other cases cited—*Lang, Sharp, Poe, Blair and Freuler*. The other cases cited dealt only with the *taxation* provisions of the Revenue Act. In the *Lyeth* case, the question before the Court was whether or not certain property was within the *exemption* provision of the Act. Clearly, the Federal Courts, in construing a provision in the Revenue Act for certain exemption from its operation, are not bound by state law in determining what property falls within such exemption. State law clearly would have no jurisdiction to determine that question. It is when Congress seeks to *impose* a tax upon property or a property right of the taxpayer, and the law of the State in which the property is situated has

determined that such property or property right does not exist or does not belong to the taxpayer, that the state law must control; and such state decision is binding on the taxing power of the Government. The rules for construction as between an exemption provision and a taxing provision are quite different. In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their operations so as to embrace matters not specifically pointed out, and in case of doubt they are construed most strictly against the Government and in favor of the citizen. *Gould v. Gould*, 245 U. S. 151.

Under the authority of the decision of the Supreme Court of Wisconsin, Elizabeth S. Morgan did not own general powers of appointment and the Commissioner could not, therefore, assess a tax against her under the claim that she did own them.

In Paul on "Selected Studies in Federal Taxation," Second series (p. 12), the author states:

"The Federal estate tax consciously incorporates state law by its reference to 'a general power of appointment' in Sec. 302(f) . . ."

The principle that the law determining whether a power of appointment is a general power is the law of the state in which the property is situated has been announced also by the Board of Tax Appeals in *Helmholz v. Commissioner*, 28 B. T. A. 165; *Kendrick v. Commissioner*, 34 B. T. A. 1040; *J. Earl Morgan, Executor v. Commissioner*, 36 B. T. A. 588 (the instant case); and *Estate of Frederick Shepherd v. Commissioner*, 39 B. T. A.—(5) (Jan. 1939), C. C. H. Board of Tax Appeals Service (1938) (p. 27950).

It is the established law of the Federal Courts that the question whether a power of appointment has been exercised by a donee, is a question upon which State law is controlling. *Johnstone v. Commissioner*, 76 Fed. (2d) 55; *Old Colony Trust Co. v. Commissioner*, 73 Fed. (2d) 970; *Blackburn v. Brown*, 43 Fed. (2d), 320.

There is no distinction in law between the authority of a state court to determine whether a donee has exercised a power of appointment and its right to determine the question as to whether a power of appointment is a general or special power. We contend that in theory and upon reason the questions involved are the same in law. The donee's dispositive rights over the property determines whether he has a general power of appointment, and those same rights determine whether or not he has exercised the power. If the latter question is admittedly under the control of the State then the question of the nature and effect of the power should be under the same control.

II.

Section 302 (f) Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932 provides that in the gross estate of the donee of a general power of appointment must be included all property passing from such donee by the exercise of said power.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or

enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or in money's worth"; * * *

The theory upon which Congress enacted the above statute was that the decedent whose estate was being taxed thereunder held in his lifetime such an authority and control over the property embraced in a general power of appointment as to give him the absolute power of disposition, practically equivalent to that of the owner of the property.

When the first bill taxing powers of appointment was reported to the House of Representatives, the report of the Ways and Means Committee was as follows, viz:

H. R. Rep. No. 767, 65 Cong. 2d Sess. (1918) 21-22.

"There has also been included in the gross estate the value of property passing under a general power of appointment. This amendment, as well as that preceding, is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is with respect to the disposition of the property at his death in a position not unlike that of its owner. The possessor of property has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority."

In other words, the Ways and Means Committee considered this power ("property in a very real sense,") (*Whitlock-Rose v. McCaughn*, 15 F. 2d 591, 592) as being owned by the donee exactly like a building, an automobile or a share of stock; property with which the donee could have paid his debts and which he could have made his own by appointing it to his executor or to his creditors.

III.

The Statutes of the State of Wisconsin define general and special powers.

(Wisconsin Statutes 1935)

"232.05 General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special Power. A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

The exercise of the powers of appointment by Elizabeth S. Morgan did not effect an alienation *in fee* of the property embraced in the powers. The fee to the property in the Isaac Stephenson estate was in the trustees under the deed of trust and had been so held by them since May 12, 1917. The fee, therefore, could not be alienated by Elizabeth S. Morgan through the exercise of her power of appointment.

Furthermore, when Isaac Stephenson granted the powers of appointment he reserved to himself the naming of the line of descent should the donees fail to exercise the powers. Under the authority of *Cawker v. Dreutzer*, 197 Wis. 98, by this reservation he gave to Elizabeth S. Morgan an estate less than a fee, subject to be defeated by the exercise of the power of appointment. He did not grant to her an absolute estate in the property nor the absolute disposition of it. Therefore, they were not general powers of appointment.

IV.

The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers.

Section 232.05 and Section 232.06 of the Wisconsin Statutes (1935).

In *Cawker v. Dreutzer*, 197 Wis. 98, heretofore referred to on page seven of this brief, the testator created a trust estate of the residue of his property. He directed his trustees to so manage the estate that it would produce a safe and reasonable income, which they were to pay to his two daughters during their lifetime, and after their death to pay over the principal to such persons "as they shall by last will and testament appoint" (p. 108, 109). Leonore H. Cawker, one of the daughters of testator, began an action in which she prayed the Court to decree that the power of appointment merged with her life estate and that such merger gave to her a complete and absolute title to the property (p. 133).

The court held that the estate was given to the trustees to hold for the life of the beneficiaries; that the trustees were to pay out only the income to the beneficiaries; that the testator's intent was manifest and that he desired to put the corpus beyond the reach of the legatees, so that they might have an assured income for life. "So he tried to put it beyond their power to dispose of the estate during their life. While he gave an absolute power of appointment, he reserved to himself the naming of the line of descent should they fail to exercise the power, and thus gave to appellant (the daughter) a vested remainder subject to be defeated only by the exercise of the powers of appointment. 23 R. C. L. 511; *Roberts v. Roberts*, 102

Md. 131, 62 Atl. 161, 1 L. R. A. n.s. 782 and note. *This should be held to effectively prevent an absolute estate in such legatees.* If not, the testator's will would be frustrated and his benevolent design set at naught. *Bradbury v. Jackson*, 97 Me. 449, 54 Atl. 1068. *The powers of appointment are not the powers of absolute disposition of the estate.*" (Emphasis ours.) (pp. 133-134.)

The Court further held that "nothing in the will of the testator here indicates that the daughters were ever to come into the possession of any part of the corpus of the estate (p. 134)"; also that "the powers of appointment did not give the power of disposition to the holders of the life estate (p. 135)"; also "neither is the power a general power as defined in Section 232.05, but is a special power under Sub. (2), Section 232.06 because it embraces an interest less than the fee (p. 135)."

V.

By the Statute of Wisconsin an absolute power of disposition not accompanied by a trust given to the owner of an estate for life or for years shall be changed into a fee. * * * Under the negative meaning applicable to these affirmative words, this provision must be construed to mean that when such a power is accompanied by a trust, the estate shall not be changed into a fee. This provision is as follows:

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case

the power should not be executed or the lands should not be sold for the satisfaction of the debts."

These are affirmative words, which also convey a negative meaning. As said by this Court, in *Marbury v. Madison*, 1 Cranch, 138, 174, "Affirmative words are often in their operation negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them or they have no operation at all."

In applying this principle to Section 232.08 of the statute in question, it is plain that the effect of the statute is to declare that an absolute power of disposition *accompanied* by a trust shall *not* be changed into a fee when given to the owner of a life estate.

It would therefore appear that the law of Wisconsin is that an absolute power accompanied by a trust is not equivalent to absolute ownership so that the property passing thereunder may be taxed under Section 302 (f) of the Revenue Act. It is not a general power of appointment.

VI.

The decision of the Supreme Court of Wisconsin in *Cawker v. Dreutzer*, holding that a power of appointment in that case was a special power, is not, as urged by respondent and as declared in the opinion of the Board of Tax Appeals, a dictum. The Wisconsin Court's decision on that question was absolutely necessary to a determination of the very issue in that case.

The contention that the decision in *Cawker v. Dreutzer*, 197 Wis. 98, is *dictum* is without foundation. It was first presented by the respondent before the Board of Tax Appeals, which adopted it in its decision (R. 96). It was

stated as a finding by Judge Lindley of the Circuit Court of Appeals, who concurred in the majority opinion (R. 123). The argument that the *Cawker* case is not a holding is based upon the unsupported assertion that the question as to whether the powers of appointment were general powers was not before the Wisconsin court. The charge of *dictum* completely ignores the words of the Supreme Court of Wisconsin in its opinion. There it recited (p. 129) the questions before it for consideration and among others: "(3) *Whether the powers of appointment in the will were valid, and, if so, their effect.*" (Emphasis ours.)

The charge of *dictum* also ignores the statement of the Court in its opinion as to the pleadings (p. 133) as follows:

"It is claimed by the plaintiff respondent that having the power of appointment whereby they may dispose by will of the whole estate absolutely and having a life estate, the two estates merge, and the daughters had complete and absolute title in the property."

It is insisted, in effect, by the respondent that the Supreme Court had no such pleading or claim of the plaintiffs before it at the time of the hearing or of the rendition of the judgment in the case. Also, that the only attempt of either of the donees to present such a pleading or claim to the court was in a pleading known in Wisconsin practice as Application for Review of Judgment, filed after the case had been tried, and which the court refused to pass upon because it was presented too late. It is true that such a request was made after the rendition of judgment, but that application was only a *repetition* of the first complaint filed by the plaintiff when the suit was started.

An examination of the files in this case in the office of the Clerk of the Supreme Court of Wisconsin shows this

clearly. The transcript of the record filed in the Supreme Court at the August Term, 1928, contains the original complaint of the plaintiff in which the following language appears (p. 5):

"Therefore, this plaintiff demands the judgment of the Court in the premises of adjudging and declaring: (1) Whether the plaintiff shall not be deemed, by virtue of the *power* given to her by said will, to possess an absolute power of disposition of her half of the residuary estate, within the meaning of the statutes of the State of Wisconsin; (2) whether, under the provisions of the State of Wisconsin, and by virtue of the absolute power of disposition given to her, *and as grantee of the power*, she is not entitled to an *absolute fee* in the one-half of the residuary estate of E. Harrison Cawker, Deceased." (Italics ours.)

In the same transcript (p. 24) appears the plaintiff's *amended* complaint, in which the above requests are also made in the identical language.

The files in the office of the Clerk of the Supreme Court also contain the brief of Leonore H. Cawker, the plaintiff in the case, in which appears (p. 15) the following, viz:

"The respondent, Leonore H. Cawker, requested both in her complaint, and in the proposed findings, that the court adjudicate whether this plaintiff shall not be deemed *by virtue of the power* given to her by said will to possess an absolute power of disposition of her one-half of the residuary estate. * * *

"This request is *repeated* in her application for a review, served and filed herein." (Italics ours.)

The "absolute power of disposition" prayed for in the complaint is a synonym for "general power of appoint-

ment." 21 R. C. L., Sec. 3, p. 774, citing *Thompson v. Garwood*, 3 Whart. (Pa.) 287.

It thus appears, as the Supreme Court of Wisconsin stated specifically in its opinion, that the plaintiff in her complaint and amended complaint, both filed prior to the hearing, had prayed for a decision on the exact question which the court determined by its decision.

The above recital in Leonore Cawker's brief that "this request is *repeated* in her application for review" is for the purpose of advising the Court that she had failed to perfect an appeal from the decree of the Circuit Court until *subsequently to the appeal perfected by another defendant*, Hortense Cawker Merrill.

The Practice Act of the law of Wisconsin at that time provided that if one of several joint or several defendants attempts to appeal, after another defendant had appealed, the latter defendant so appealing must, in a *petition for review of the judgment, repeat the allegations of her petition*, in order to present her exceptions to the Supreme Court. It was this *second and repeated request*, made by Leonore Cawker after judgment, in her petition for review of judgment, which the court *refused to entertain*. Due consideration given to the words of the Court in *Cawker v. Dreutzer* would have shown how unfounded was the charge of *dictum* in this case.

It was necessary to adopt this unusual procedure in order to present the actual pleadings in *Cawker v. Dreutzer* to this Court but we felt it only fair to ourselves and to the Court that it should be told the exact situation.

VII.

The powers in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments granting to the trustees at their discretion the right to annul any appointment made by the donee. These restrictions stamp the powers of appointment as special powers.

This clearly appears from the decision in *Hepburn v. Commissioner*, 37 B. T. A. 459.

The petitioner has assigned as error the failure of the Circuit Court of Appeals to hold that the authority vested in and the directions given to the Trustees by the will and deed of trust of Isaac Stephenson, to annul any appointment made by the donee, was a positive restriction upon the power of Elizabeth S. Morgan to appoint.

This restriction is implicit in the very grant of the power to her. Item 15 of the deed of trust (R. 26) and Item 26 of the will (R. 61) provide that whenever in the judgment of the Trustees the trust property going to any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for any other reason or reasons*, the Trustees shall withhold, in their judgment, from any such beneficiary, the whole or any part of said trust property, whether income or corpus (Emphasis ours). By reason of this right of the Trustees to nullify the exercise by the donee of the powers of appointment they are unquestionably special powers and not general powers. The will of the donee was fettered, from the very inception of the powers by the directions to the Trustees. Her power to appoint was restricted by the authority invested in the Trustees. She might make the appointment only to persons

meeting the approval of the Trustees. The powers, therefore, were special powers and not general powers of appointment.

It cannot be answered that the Trustees have not objected to the appointees selected by Elizabeth S. Morgan and may never object. In *Hepburn v. Commissioner, supra*, the will provided that the donee could not appoint without the written approval of the testator's trustees. The Board of Tax Appeals held in that case that *although the Trustees had given their written approval to a number of appointments made by the donee, including the last appointment under which the Commissioner of Internal Revenue sought to include the value of the property passing thereunder, still the provision compelling her to obtain their approval rendered her will subject to theirs. Therefore, the power of appointment was not a general power.*

The test in the instant case as in the *Hepburn* case is *not* whether the Trustees have or have not objected to appointees of the donee. The element that destroys the powers of appointment as general powers is the fact that the trustees *have the authority* to annul the exercise, defeat the appointment and therefore in reality, to select the appointees.

In the instant case, the right of the trustees to withhold property, *for any reason*, from an appointee is in effect the right to defeat the appointment, and that right exists and will continue to exist for seven years. It is immaterial whether the trustees *ever* withhold the property. It is their *power* to withhold the property which limits the will of the donee. The powers of appointment here are, therefore, not "unfettered." (*Leser v. Burnet*, 46 Fed. (2d) 756.)

The restriction upon the powers of appointment, through the right of the trustees to withhold property applies to

the appointees in whose favor the power may be exercised by the donee, and the provision regarding the withholding of property embraces any appointee in whose hands the property, in the judgment of the trustees, might be dissipated or improvidently handled, through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influence of others affecting business capacity, *or for any other reason or reasons.* The judgment of the trustees is final and conclusive.

The restriction is in effect an actual direction by the donee's father to her, that the class described by him in the above words as being disqualified, must not be appointed by her in the exercise of her power of appointment. His intent to restrict her power is unmistakable.

The fact that the determination of the authority of the trustees to nullify the donee's exercise of the power, is confided to the judgment of the trustees, does not argue in any wise that there is no limitation of the power of appointment. The donee exercising the power is under the same restrictions in respect to that exercise as are the trustees in determining the propriety of the exercise. It is not a situation where the grant of power may be exercised by the donee regardless, with, for instance, a succession of appointees, each one after the other, who have been declared by the trustees to be of the forbidden type. The provision is a sensible one and binding upon Elizabeth S. Morgan *to the same extent as upon the trustees. The donor obviously in the limitation stated was speaking to Elizabeth S. Morgan in the same voice with which he was speaking to the trustees.* This is not the case of a grant of unlimited power of appointment to Elizabeth S. Morgan subject to defeasance at the will of the trustees, although even this would have given her something very short of

absolute or fee simple title. It is a case in which she, in exercising her power as donee, may do so only for the benefit of the class of proper appointees so described by her father, with no thought that she would make an appointment or a series of appointments, each one in turn to be ruled out by the trustees until one appointee happened to avoid the limitations.

There is no doubt that the trustees may withhold the property appointed to unworthy appointees exactly the same as they may withhold it from other unworthy beneficiaries, who receive it under other provisions of the will and deed of trust.

This provision of the trust deed requires the trustees to pay the income to such person or persons as are appointed to receive the income, and, at the termination of the trust, to transfer the property to such person or persons as are appointed to receive the principal. The Circuit Court of Appeals commented upon the fact that the trust deed makes no provision defining the appointee's interest in case he should die intestate. No more does the trust deed make provision for the disposition of the appointee's interest in case he should die testate. In fact, no provision is made as to what should happen in case the appointee should die before coming into the enjoyment of the appointed property. This failure to include such a provision certainly does not make the appointee any less a "beneficiary" within the meaning of Item 15 (R. 26).

If the appointee should die before coming into the enjoyment of the appointed property, regardless of whether it should be held that the appointed property should then be paid to his legatee if testate, or his issue or heirs if intestate, or be held to lapse and the property be required to be distributed among the remaining parts, the appointee

would nevertheless be a beneficiary within the meaning of the law and the intent of the will and deed of trust. His legatees, heirs, issue or the beneficiaries of the remaining parts respectively, as the case might be, would take his place as beneficiaries under the trust deed within the meaning of Item 15. At the time of distribution, on the termination of the trust, a duty will devolve upon the trustees to determine in each case, in order to carry out the purpose of the trustor, as set forth in the preamble of the trust deed, and in Items 15 (R. 26) and 26 (R. 61) thereof, whether the beneficiary, however designated, is worthy.

An examination of the trust deed reveals that Isaac Stephenson used the word "beneficiary" in only four items of his will, including Item 15. The other items are Items 12 (R. 26), 18 (R. 28) and 23 (R. 32). We find no express provision of the creator of the powers in any of these items, or anywhere in the deed, distinguishing between beneficiaries named by him and appointees named by his donees. There are no reasons for believing that he intended to distinguish between the beneficiary named by him and the beneficiary (appointee) named by his donees, in addition to the fact that no such provision is made in the trust deed.

The trust was to continue for twenty-one years after the death of the grantor and his wife, the latter dying in 1925, and, as his children were all given powers of appointment, the grandchildren would not be protected in the manner contemplated by him unless the appointees were included in Item 15, since the children who were donees of the powers could appoint their own children, or as to those who had none, their brothers and sisters, or their nephews and nieces.

The Circuit Court of Appeals held that Isaac Stephenson intended to differentiate between beneficiaries and ap-

pointees to the extent that the property might be withheld by the trustees from the "beneficiaries" *but not the appointees*. We understand the theory of the Court on this point to be that if a donee who, of course, is a named beneficiary, one of trustor's children, should be found unworthy and die, exercising his power of appointment, the withheld property could not be paid to the appointee, as such, since by the deed such trust property must be paid to the donee's issue as such. Insofar as there is this limitation on the exercise of the power, supporting our contention that it is a special power, we should not object. We think this fault appears in the argument of the Court: it fails to distinguish between an effective and an ineffective appointment. Of course, the appointee under an ineffective appointment could never be a beneficiary under such appointment. Thus, a named beneficiary who dies before the trust terminates, could only have had income withheld. Such accumulated income is the withheld property which must be paid to his issue, or, if none, be distributed among the other parts. The principal and subsequent income of his trust part was never property which the trustees could have paid to him and so could not be as to him "withheld property." The principal could not be withheld until the time for distribution arrives and the distributee is known. Until the distributee is known, the trustees could not determine whether he is worthy or unworthy. Therefore, the appointee of such donee will take the property included in the trust part appointed, being income after the appointment and principal, but withheld property, being income before the appointment, will go to the issue of the donee, and, in default of issue, to the other parts. To say that an appointee cannot be a "beneficiary" as to property withheld from him, is not to say that he cannot be a beneficiary with respect to property as to which the appointment takes effect. As will be noted, even as to withheld prop-

erty, if the unworthy beneficiary leaves no issue, such withheld property goes to the other remaining parts, the beneficiaries of which may be the appointees of worthy beneficiaries. So, whether or not the trustor eliminated the appointees to withheld property yet he did not exclude them as to property with respect to which the appointment takes effect.

The Circuit Court of Appeals says in its opinion that when a named beneficiary dies intestate, the trust deed provides that income shall be paid to issue then surviving, and, at the termination of the trust, the trustees shall transfer all property then in their possession to then surviving issue. The Court evidently refers to the provisions of the deed corresponding to the fourth paragraph of Item 10 of the Trust Deed (R. 23, 24) providing for the contingency of death. It will be noted that by the proviso contained in this paragraph, if there should be no issue the income and property is to be distributed equally among all the other then existing remaining parts.

The above analysis clearly shows that the word "beneficiaries" used by Isaac Stephenson in his will and trust to denote the objects of his bounty from whom property should be withheld by his Trustees if they proved unworthy was intended to include the appointees under the power of appointment. The Circuit Court of Appeals, however, held that appointees were not embraced in the word "beneficiaries" (R. 119). In other words, the Court reached the astonishing conclusion that Isaac Stephenson, while using every means within his power, through provisions in his will and deed of trust to prevent his estate from being dissipated by unworthy children, grandchildren or other relatives designated in his will and deed of trust, was nevertheless perfectly willing to have his estate dissipated by unworthy, spendthrift or wastrel *appointees* whose appoint-

ment by his daughter he did not even attempt to prevent. It is inconceivable that he had any other intent than to include unworthy "appointees" among his unworthy "beneficiaries" whose appointment could be defeated by his trustees.

It is well settled in law that an "appointee" under a power of appointment in a will or trust is also a "beneficiary" thereunder. 69 C. J., p. 851, Sec. 1961; *Lederer v. Pearce*, 262 Fed. 993, 997; Affirmed. 266 Fed. 497.

VIII.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment.

In *Cawker v. Dreutzer*, 197 Wis. 98, the Court in holding that the powers of appointment in the Cawker will were special and not general powers, said (p. 133):

"The courts in this country have uniformly tried to give effect to the intent of the testator, where that

intent is ascertainable, unless it is contrary to some statute or other positive law. Here the estate is given to trustees to hold for the life of the beneficiaries. They are to invest the corpus and pay over the income only. The testator's intent is manifest."

Likewise, there can be no question of the same intent on the part of Isaac Stephenson to prevent his children to have any ownership or control over his estate until the termination of his trusts. In the opening paragraph of his will (R. 38) he says:

"It is my chief desire by this will to insure an adequate and comfortable support for my wife during the remainder of her life and to relieve her of all the cares and uncertainties of business affairs, and to provide for the distribution of my estate equally among all my children and the issue of my deceased children, such issue taking by right of representation, as I have hereinafter provided."

He also stated in the opening paragraph of his deed of trust (R. 13):

"It has been my observation that many widows and children have been unable to properly preserve the principal of the fortunes they have inherited, and I desire to provide for the support of my beloved wife, Martha E. Stephenson, and my children and grandchildren so that my wife shall always have a sufficient income and shall not be wholly dependent upon what she may receive from my estate, and so that my children and grandchildren shall be insured a comfortable living for many years after my death; and also to make ample provision for myself during my life and before the infirmities of old age shall have dulled my intellect."

It is thus manifest that, as in the *Cowker* case and in the *Hepburn* case, it was the intent of Isaac Stephenson to put the corpus of his estate beyond the reach of his wife and children, five of whom were daughters, so that they might have an assured income and not be reduced to penury through their inexperience in handling business and financial matters, if given immediate possession and control of his estate.

The language quoted above from the will and deed of trust here is eloquent proof of his intention not to give to his children a general power of appointment, which is equivalent to "outright ownership" (*Fidelity Trust Co. v. McCaughn*, 1 Fed. (2d) 987, 988), but to withhold such ownership from them for years.

The intention of Isaac Stephenson controls over any definition or technical words in the instruments before the Court.

The fact that Isaac Stephenson in his will and deed of trust used the words "to such person or persons as she may appoint" (R. 19) which words may have a technical legal signification, does not outweigh the evidence of the testator's (trustor's) intention not to employ the words or terms in their technical sense. If that intention does appear from the instruments, it is the duty of the Court to construe the words, not in their technical sense but so as to effectuate his intention. 69 C. J. 76; *Lyons v. Lyons*, 233 F. 744, 746.

If it should be held that petitioner is foreclosed from showing the intent of the testator (trustor), on the ground that his intent is immaterial, inasmuch as the words used by him have a technical meaning which cannot be changed by his intent, such a holding would deprive petitioner of his property without due process of law in violation of

the Fifth Amendment to the Constitution of the United States. *Heiner v. Donnan*, 285 U. S. 312.

The value of the property passing under the powers of appointment exercised by Mrs. Morgan cannot be included in her estate for taxation (Sec. 302(f) Revenue Act) unless the powers are general powers of appointment. The powers here are not *general powers of appointment* unless Isaac Stephenson *intended* to grant to his daughter as donee a general power of appointment and thus to give her at his death the immediate and complete ownership of her part of his estate. But such a conclusion is contradicted by every provision of his will and deed of trust which instruments, like the Levi Morton will construed in *Hepburn v. Commissioner*, 37 B. T. A. 459, are "replete with provisions clearly indicating his desire," (p. 466) that his children should have neither the ownership nor the control of his property until twenty-one years after the death of the trustor and his wife.

The intention of the testator and trustor must be ascertained from the language of the instruments.

"Powers are to be construed in accordance with the intention of the donor or grantor, as determined under the rule relating to the construction of instruments generally." 49 C. J. p. 1260.

"A power cannot be extended beyond its express terms, *and the clear intention of the donor.*" *Ibid.* (Italics ours.)

The Circuit Court of Appeals in this case recognized this rule of law, but contented itself with simply examining the alleged intention of the testator *not* to restrict the general power of appointment, and the Court decided that he had not restricted it. (R. 118, 119, 120, 121.)

In *Smith v. Bell*, 6 Pet. 68, 75, Chief Justice Marshall said:

"The first and great rule in the exposition of wills to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

This Court has also held that the same rule applies to the construction of trusts:

"They are rights arising solely out of the intent of the party who created them and therefore such intent could be the only guide in the execution of them."
(*Green v. Green*, 90 U. S. 486, 490.)

The petitioner has assigned for error that the Circuit Court of Appeals did not, as was held necessary in *Hepburn v. Commissioner*, 37 B. T. A. 459, ascertain the intention of the testator, "which is controlling" (p. 465) in the determination of the question as to whether the power of appointment is a general or a special power.

The only ground upon which this tax can be sustained is that Isaac Stephenson granted, and *intended* to grant to his children, immediately upon his death, the equivalent to complete ownership of his estate, by investing them with general powers of appointment.

⊙ Fifteen years prior to Mrs. Morgan's death, he had conveyed his estate to trustees and had inserted in his will and deed of trust provisions giving to them the entire management and control of all of his property, the same "as I could do if I still were the sole owner of said trust property" (R. 29).

He recites in great detail the powers granted to his trustees in his deed of trust (R. 28, 29, 30, 31) and in his will

(R. 60, 61, 62, 63, 64, 65). Among other powers was the power to the trustees to withhold from unworthy appointees property which his donees had appointed to unworthy beneficiaries (R. 26, 27, 61). That is one of the powers which he instructs his trustees to perform the same as he could do if he were still the sole owner of the property (R. 29, 64).

Can it be argued, without a reduction to absurdity, that Isaac Stephenson conveyed to his trustees not only the legal title to his property, granting also to them absolute powers of control, management and disposition thereof, and that he, in the same document and almost in the same paragraph, granted to Elizabeth S. Morgan and his other children and intended to grant to them the absolute power of disposition over the same property, conveying to them at his death the equivalent of ownership thereof. If he did such a thing it would be a grave reflection upon his sanity.

IX.

There is no valid federal definition nor legal standard of a general power of appointment; and there being also no binding decisions of federal courts defining powers of appointment there is consequently no federal law on that subject.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a legal standard by promulgation of Regulations 37 and 80 is unavailing.

(b) Even if it be held in this case that the law of the State controls only when the federal taxing act by express

language or necessary implication makes it dependent upon the State law, the law of the State of Wisconsin must still be resorted to to ascertain the meaning of a general power of appointment in that State because there is no valid federal definition of that term.

(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, such definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.

The Treasury Department, apparently seeking to remedy the lack of definition of general power of appointment in the Revenue Act, promulgated in 1919 Treasury Regulation 37, Article 30, which purported to define a general power as "one to appoint to any person or persons in the discretion of the donee." We contend that the Treasury Department, in promulgating this regulation, assumed legislative power by attempting to add to the provisions of the Revenue Act which Congress alone has the constitutional power to do. Congress has not taxed the exercise of a special power of appointment. Under the Constitution, Congress alone has the power to tax it. The department cannot tax it by a regulation. Congress did not delegate to the Commissioner the authority to extend by regulations the provisions of the Revenue Act. The Constitution vests in Congress and in Congress alone the authority to make the laws, and the legislative authority thus derived from the people cannot be delegated. Hence, Congress cannot approve or adopt a regulation which purports to make law. As said by a distinguished author quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 134:

"The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations and to carry into effect the will of Congress as expressed by statute." Hughes on Federal Death Tax, p. 40, Sec. 18.

To illustrate the attitude of the courts toward the ever growing number of regulations pertaining to the taxing statute, which regulations clearly exceed the power of the Commissioner or Secretary of the Treasury, we need only call the Court's attention to the case of *Commissioner of Internal Revenue v. S. F. Shattuck*, 97 F. 2d 790. The Court held that Article 19 of Regulation 79 should be ignored because it exceeded the power of the Commissioner and being so, it was invalid.

We submit that Regulation 37 (and its succeeding Regulation 80) are attempts by the Commissioner to add a legislative provision to Section 302 (f) and to fix a definite and fixed standard for the construction and interpretation of every power of appointment, regardless of the intention of the testator or trustor creating such power. The regulations ignore the legal effect of the varying facts and circumstances in the widely differing cases coming up for construction before the courts and the many other elements which enter into and affect the interpretation of wills and trusts and the effect of powers of appointment therein contained. They disregard the fundamental principle of interpretation of powers, which is that "powers are to be construed in accordance with the intention of the donor or grantor, as determined under the rules relating to the construction of instruments generally." 49 C. J. 1260. "In determining the nature, scope and extent

of a power conferred by will, the intention of the testator governs." 69 C. J. 833.

The regulation, if held valid, would take from every state and lodge with an executive department the right to conclusively construe and interpret all powers in wills and trusts by iron-clad regulation.

It follows that, because of the lack of power of the Commissioner to promulgate Regulation 37 (and the later Regulation 80) there is no valid federal definition of the words "general power of appointment."

Regulation 37 was superseded in 1924 by Regulation 80. This regulation reads in part as follows:

"Ordinarily," a general power is one to appoint to any person or persons in the discretion of the donee of the power." (Italics ours.)

The words of Regulation 80 are identical with the words of Regulation 37, with the exception of the word "ordinarily," which has been inserted in the later regulation. This word simply adds to the indefiniteness and uncertainty of the attempted definition in Regulation 37.

It will be seen that Regulation 80 purports to give the definition of the meaning of "general power of appointment" applying *only* "ordinarily" to powers which are to be construed to ascertain their meaning. In Webster's dictionary, the word "ordinarily" is defined to mean "customarily" or "usually." By the terms of the regulation it is plain that it does not purport to apply to *all* cases of general power of appointment. No rule is laid down by the regulation as to what proportion of the cases it will apply, and no rule is established therein for "unordinary" or "unusual" cases.

Regulation 80 cannot be held to fulfill the requirements of a statutory standard or definition. It is not even a valid administrative interpretation. Public statutes must be universal, according to Blackstone (25 R. C. L. 763). "A statute cannot be vague. It must be clear, certain, definite and specific." (59 C. J. 601.)

Great Lakes Hotel Co. v. Commissioner, 30 F. (2d) 1.

We have been unable to learn the reason for the insertion of the word "ordinarily" in Regulation 37, now Regulation 80. However, it must have become apparent to the taxing officers of the Government that the regulation could not establish a fixed and uniform rule governing all cases of wills and trusts containing powers. Therefore, the attempt was made to make the regulation more elastic through this insertion. The result is, however, that the regulation has been made thereby even more uncertain and indefinite than before.

A distinguished professor of law, Erwin N. Griswold, in discussing the changes above set out in these regulations has written: "For many years the only change (in the regulations) was the insertion of a *guarded 'ordinarily'* at the beginning of the first of the quoted sentences." (52 Harvard Law Review, 929, 938, April, 1939.) (Italics ours.)

Webster's definition of the word "guarded" is "exhibiting caution." The necessary implication of that word is that everyone dealing with powers of appointment must understand that this federal definition does not embrace *all* of the cases of general powers of appointment. It is indefinite and uncertain, and lacking in universal application and accordingly void even as a regulation.

But it may be replied that by the repeated reenactment of the Revenue Act of 1918, the original Treasury Regulation 37 (and the modified Treasury Regulation 80) containing definitions of general power of appointment and constituting thereby the administrative definition of the "general power of appointment" have been approved and adopted by Congress, and have therefore the force of a statute.

Even if that were true, the defect of indefiniteness, uncertainty and failure to include *all* general powers of appointment follows this definition into the statute and makes the statutory definition void.

Such being the case, even if it be held that the principle announced in *Burnet v. Harmel*, 287 U. S. 103, applies to the case at bar, the law of the State of Wisconsin would still control because, there being no valid federal definition of general power of appointment, either in the revenue statute or the regulations thereunder, and no binding federal decisions, Section 302(f) Revenue Act of 1926 by necessary implication has made its own operation dependent upon State law. Therefore the law of the State of Wisconsin must be resorted to here in order to ascertain the controlling definition and construction of the powers of appointment in question.

United States v. Cambridge Loan and Building Co., 278 U. S. 55. (No federal definition of "building and loan association.")

Wurlitzer v. Commissioner, 81 Fed. (2d) 971. (No federal definition of "non-voting stock.")

Graham v. Commissioner, 95 Fed. (2d) 174. (No federal definition of the term "actually rendered.")

(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, said definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.

Johnstone v. Comm'r., 76 Fed. (2d) 55 (Ninth Circuit).

Wear v. Comm'r., 65 Fed. (2d) 665 (Third Circuit).

Lee v. Comm'r., 57 Fed. (2d) 399 (Dist. Col.).

Straiton v. U. S., 50 Fed. (2d) 48 (First Circuit).

Fidelity-Philadelphia Trust Co. v. McCaughn, 34 Fed. (2d) 600 (Third Circuit.)

They are not authority because there is no common law of the United States. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78.

All of the above decisions attempt to give a definition of "general powers of appointment." They are all based upon either state decisions or textbooks, which announce the "general usage" or common law.

In *Erie R. Co. v. Tompkins*, *supra*, this Court overruled *Swift v. Tyson*, 16 Pet. 1, 18, which held that federal courts were "free to exercise an independent judgment as to what the common law of the State is—or should be." The Court in *Erie R. Co. v. Tompkins* further declared (p. 71): "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, * * *. And no clause in the Constitution purports to confer such a power upon the federal courts."

X.

The will of Isaac Stephenson was dated June 15, 1916. The deed of trust was executed May 12, 1917, and the fee to the property in question here was deeded to the trustees by him on the same date. Isaac Stephenson died March 15, 1918. The earliest federal revenue act in which property passing under the exercise of powers of appointment was taxed was enacted February 24, 1919. The attempt here to tax in the estate of Elizabeth S. Morgan the value of the property passing under the power of appointment to her, if held to be legal, is so arbitrary and capricious as to amount to a confiscation and offend the 5th Amendment.

Nichols v. Coolidge, 274 U. S. 531, 542.

CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

AUG 30 1939

CHARLES ELMORE, CLERK
CLERK

No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	3
Argument.....	7
Conclusion.....	14

CITATIONS

Cases:

<i>Blackburne v. Brown</i> , 43 F. (2d) 320.....	7, 11
<i>Blair v. Commissioner</i> , 300 U. S. 5.....	12
<i>Burnet v. Harmel</i> , 287 U. S. 103.....	12
<i>Cawker v. Dreutzer</i> , 197 Wis. 98.....	9
<i>Freuler v. Helvering</i> , 291 U. S. 35.....	12
<i>Fidelity-Philadelphia Trust Co. v. McCaughn</i> , 34 F. (2d) 600, certiorari denied, 280 U. S. 602.....	7, 11
<i>Helvering v. Grinnell</i> , 294 U. S. 153.....	14
<i>Lang v. Commissioner</i> , 304 U. S. 264.....	12
<i>Lee v. Commissioner</i> , 57 F. (2d) 399, certiorari denied, 286 U. S. 563.....	7, 14
<i>Leser v. Burnet</i> , 46 F. (2d) 756.....	7, 9, 10
<i>Lyeth v. Hoey</i> , 305 U. S. 188.....	13
<i>McFee'y v. Commissioner</i> , 296 U. S. 102.....	8
<i>Morrissey v. Commissioner</i> , 296 U. S. 344.....	8
<i>Poe v. Seaborn</i> , 282 U. S. 101.....	12
<i>Sharp v. Commissioner</i> , 303 U. S. 624.....	12
<i>Stratton v. United States</i> , 50 F. (2d) 48, certiorari denied, 284 U. S. 651.....	11
<i>Whillock-Rose v. McCaughn</i> , 21 F. (2d) 164.....	7, 9, 10, 11

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Sec. 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169: Sec. 302 (U. S. C., Title 26, Sec. 411).....	2
Statutes of Wisconsin, 1937: Sec. 232.05.....	8
Sec. 232.06.....	8

Miscellaneous:

Griswold, Powers of Appointment and the Federal Estate Tax, 52 Harv. L. Rev. 929, 942.....	12
Treasury Regulations 37, Art. 30.....	7
Treasury Regulations 80, Art. 24.....	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED, PETITIONER**

v.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91-96) is reported in 36 B. T. A. 588. The opinion of the Circuit Court of Appeals (R. 112-122) is reported in 103 F. (2d) 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1939. (R. 124.) Petition for writ of certiorari was filed July 19, 1939. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain powers of appointment exercised by the decedent by her last will were general powers of appointment within the meaning of Section 302 (f) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Sec. 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. (U. S. C. Title 26, Sec. 411.)

Treasury Regulations 80 (1934 Ed.):

ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised by will and such donee dies after the enactment of the Revenue Act of 1918. * * *

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate. * * *

STATEMENT

The facts as stipulated (R. 75-78) and as found by the Board (R. 91-93), may be summarized as follows:

The decedent, Elizabeth S. Morgan, died testate on May 3, 1933, a resident of the State of Wisconsin, and petitioner is the duly appointed executor of her last will and testament. Isaac Stephenson, decedent's father, died testate on March 15, 1918, likewise a resident of the State of Wisconsin. By his last will and testament and several codicils thereto, he conveyed certain property in trust for the benefit of his children. The

children were to receive the income annually and a certain portion of the principal at the end of four, eight, and twelve years after his death, and the entire remaining principal at the end of sixteen years after his death, provided they were living at the end of each of the four-stated periods. (R. 91-92.) The trust estate was divided into nine parts, part numbered five being conveyed in trust for decedent's benefit pursuant to the following provisions (R. 92):

Item Fifteen: I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate * * *

I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) * * *

The trust further provided that, should decedent die without exercising the power, then whatever portion of the principal remained should go to her issue, and, in the event of her death without issue, then such remaining portion of the principal should be equally divided and distributed among the other remaining parts into which the estate was divided. (R. 92.)

Shortly before his death Isaac Stephenson executed a deed of trust to continue for 21 years after his death. The trust property subject to this deed of trust was also divided into parts and one part allocated to each beneficiary. (R. 113.) The following provisions of the deed of trust related to decedent (R. 18-19, 92-93):

7. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

If my daughter Elizabeth S. Morgan should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment * * * then and in any

such event the annual income from said part five (5), * * * shall be paid annually by said Trustees to her issue surviving * * * and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), * * * to the then surviving issue of my said daughter, * * *.

During her life, decedent received the distributions payable to her at the end of the fourth, eighth, and twelfth years after the death of her father, as provided for in his will, but she did not receive the distribution payable to her at the end of the sixteenth year because of her prior death. (R: 93.)

By her last will and testament, decedent exercised the power of appointment under her father's will as to that portion of the property which she would have received at the end of the sixteenth year after her father's death, had she lived, and she also exercised the power of appointment given her by her father's deed of trust, the appointments being in the following words (R. 93):

Twenty-Second: Under the last will and testament of my father * * * I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan * * *.

Twenty-Third: Under the Deed of Trust dated May 12, 1917, * * * I do

hereby appoint my husband, J. Earl Morgan * * *

The Commissioner of Internal Revenue determined that both powers which decedent exercised by will were "general" powers of appointment; and that the value of the property passing under the powers should be included in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended by Section 803 (b) of the Revenue Act of 1932. The Board of Tax Appeals approved the Commissioner's action (R. 91-96), and the court below affirmed (R. 124).

ARGUMENT

The term "general power of appointment," as used in the Revenue Act, has consistently been construed to mean the power to appoint to any person or persons in the discretion of the donee of the power. *Lee v. Commissioner*, 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563; *Leser v. Burnet*, 46 F. (2d) 756 (C. C. A. 4th); *Blackburne v. Brown*, 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co. v. McCaughn*, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164 (C. C. A. 3d); Treasury Regulations 80, Art. 24.¹ Under this test the Circuit Court of Appeals

¹ The Revenue Act does not define "general powers of appointment." However, in the 1919 revised edition of Treasury Regulations 37 a general power is defined in Article 30 as "one to appoint to any person or persons in the discretion of the donee." Substantially the same definition

was clearly correct in its conclusion that the powers vested in the decedent were "general" powers and that, therefore, the property passing pursuant to decedent's exercise of those powers was taxable under Section 302 (f) of the Revenue Act of 1926, as amended.

Petitioner does not deny that, apart from certain veto powers vested in the trustees which are referred to below, the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion, but contends that the determination of whether such a power is "general" or "special" within the meaning of the Revenue Act depends upon the manner in which such a power is characterized under Wisconsin law, rather than upon the interpretation which the federal courts have given to the Federal tax statute. Petitioner urges that under the provisions of a Wisconsin statute, set forth in the margin,²

has been contained in all later regulations, the only change being the addition of the word "ordinarily" in the 1924 and subsequent regulations. The repeated reenactment of the provisions first contained in the Revenue Act of 1918, relating to property passing under a general power of appointment, in the light of the administrative definition of a general power, shows that Congress adopted the administrative construction. *McFeely v. Commissioner*, 296 U. S. 102, 108; *Morrissey v. Commissioner*, 296 U. S. 344, 355.

² Statutes of Wisconsin, 1937, Sec. 232.05. "*General Power*. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever."

232.06. "*Special Power*. A power is special: (1) When the person or class of persons to whom the disposition of the

and a casual reference thereto in *Cawker v. Drentzer*, 197 Wis. 98, 135, the power vested in the decedent would be characterized as "special" by the Wisconsin courts.

The court below found it unnecessary to decide whether, under Wisconsin law, the power vested in decedent would be deemed general or special. It held that, under Wisconsin law, the language of the grant of power vested in the decedent unlimited power to appoint to any person or persons, and concluded that "such a power satisfies the definition of a general power as that term is used in Section 302 (f), even though it is characterized as a special power under statutory provisions in Wisconsin" (R. 116).

1. The decision of the court below is in entire accord with the decisions in *Leser v. Burnet*, *supra*, and *Whitlock-Rose v. McCaughn*, *supra*, with which petitioner asserts it to be in conflict. In *Leser v. Burnet*, which likewise involved a transfer of property passing under the exercise of a power of appointment, the court first determined, independently of any local statute or court decision, the meaning of "general power" as used in the Revenue Act and held that such a power is "one which may be exercised by the donee of the

lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

power in favor of any person whomsoever including the donee himself or his own creditors" (46 F. (2d) at 758). The court then said that it was necessary to determine whether the particular power involved was "a general power within this meaning of the act of Congress" and stated that this was to be determined by the law of Maryland (p. 760). Since, under Maryland law, the power in question could not be exercised in favor of the donee's creditors, the court concluded that it did not come "within the meaning of a general power of appointment as that term is used in the language of the revenue act" (p. 761). Thus the same approach was used in the *Leser* case as in the case at bar: state laws were examined to determine the precise scope of the power created by the language in the grant and, this having been determined, the question of whether a power of such scope came within the definition of a general power for purposes of the Revenue Act was decided as a matter of federal law.

- *Whitlock-Rose v. McCaughn*, *supra*, enunciates the same principle. The question there involved was whether a power of appointment exercisable only by will was a general power within the meaning of the Revenue Act. The court, interpreting the Act to cover any power in which there was no restriction as to appointees, even though there was a restriction as to the method of appointment, held the power there involved to be general because under state law the donee of such a power was sub-

ject to no limitations in the choice of his appointees and the property subject to the power was subject to the donee's debts.*

The Wisconsin statute upon which petitioner relies in the present case to change an otherwise general power into a special power in no way restricts the donee's selection of appointees; it provides merely that a power authorizing the alienation of an estate or interest less than a fee shall be deemed special. While we do not concede that the estate here involved was less than a fee within the meaning of that statute, it seems entirely clear that the statute could not in any event affect the operation of the federal taxing act. The tax here is not on property but on the privilege enjoyed by the decedent in the exercise of a power. *Stratton v. United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651. The Revenue Act is obviously concerned with the latitude of the power rather than with the quantum of the

* The court's statement in the *Whitlock-Rose* opinion that "The law of New Jersey controls this case," when read in its context in the opinion as a whole, obviously refers only to the state law with respect to the scope of the power. If this were not otherwise perfectly clear, it is made so by the subsequent decisions of the same court in *Fidelity-Philadelphia Trust Co. v. McCaughn*, *supra*, and *Blackburne v. Brown*, *supra*, holding, in accord with the decision of the court below in the present case, that the meaning which state law attributes to the term "general power of appointment" is not binding upon the federal courts in construing those words in the Revenue Acts.

estate passed pursuant to its exercise, for the tax is imposed upon "any property" passing under a general power of appointment. There is no basis for reading into the statute the qualification that the property must be a fee simple estate. Consequently it is immaterial that, under the Wisconsin law, the power here involved might possibly be classified as "special" because it might be held to authorize the alienation of less than a fee. See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 942.

2. The decision below is not in conflict, as petitioner contends (Pet. 10, 20-25), with the decisions of this Court in *Lang v. Commissioner*, 304 U. S. 264; *Sharp v. Commissioner*, 303 U. S. 624; *Blair v. Commissioner*, 300 U. S. 5; *Freuler v. Helvering*, 291 U. S. 35; or *Poe v. Seaborn*, 282 U. S. 101. Those cases merely hold that state law is controlling in determining the nature of the legal interest which the taxpayer had in the property or income subject to taxation. They do not hold that, after the nature of such interest is established, state law controls in determining whether such interest comes within the terms of the Revenue Act.

As pointed out in *Burnet v. Harmel*, 287 U. S. 103, state law creates legal interests but the federal law determines when and how they shall be taxed. There this Court held that a Texas gas and oil lease, which under Texas law was classified as a sale, was

not the type of transaction constituting a sale within the contemplation of the federal statute taxing capital gains. More recently, in *Lyeth v. Hoey*, 305 U. S. 188, a case dealing with the federal estate tax, this Court recognized that the taxpayer's status as an heir was to be determined by state law but that when, pursuant to a compromise agreement among the heirs, a distribution was made, the question whether the property so received was "acquired by inheritance" within the meaning of the federal taxing statute was necessarily a federal question.

3. While not asserted as a reason for granting the writ, the further contention is made in the brief supporting the petition (Br. 33) that the will and trust deed must be construed as vesting a veto power in the trustees over any appointment made by the donee of the power. This contention was rejected by the court below after full consideration (R. 118-122) and its decision in this respect presents no conflict but involves merely the construction of the particular instruments here involved. Accordingly, it furnishes no basis for the issuance of the writ.

4. The additional contention is stated but not argued (Br. 46) that the Revenue Act as applied to this case is invalid because retroactive, the power of appointment having been given prior to the first enactment of the tax. This contention is unten-

able. The statute may be applied if the power is exercised after the date of enactment. *Lee v. Commissioner, supra.*⁴

CONCLUSION

There is no conflict of authority. The decision below is in accord with the applicable decisions of this Court. The petition should be denied.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
JOSEPH M. JONES,

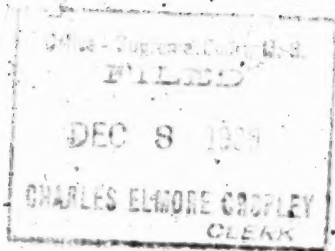
Special Assistants to the Attorney General.

RICHARD H. DEMUTH,
Special Attorney.

AUGUST, 1939.

⁴ Disapproved only as to another point in *Helvering v. Grinnell*, 294 U. S. 153.

FILE COPY



No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	3
Summary of Argument.....	8
Argument:	
I. Under Section 302 (f) of the Revenue Act of 1926 a power to appoint to any person or persons in the discretion of the donee of the power is a general power of appointment.....	10
II. The "spendthrift" provisions of the trust instruments do not limit the generality of decedent's powers of appointment.....	23
1. The trustees' power to withhold does not apply to appointees of named beneficiaries.....	24
2. Even if the trustees' power to withhold did apply to appointees, decedent's power of appointment would still be general in character.....	31
III. The application of Section 302 (f) of the Revenue Act of 1926 to property passing under powers of appointment exercised in 1933 although vested prior to the first enactment of the tax is not invalid as retroactive.....	33
Conclusion.....	35
Appendix.....	36

CITATIONS

Cases:	
<i>Ana Maria Co. v. Quinones</i> , 254 U. S. 245.....	34
<i>Bankers Coal Co. v. Burnet</i> , 287 U. S. 308.....	14
<i>Blackburne v. Brown</i> , 43 F. (2d) 320.....	12, 17, 35
<i>Blair v. Commissioner</i> , 300 U. S. 5.....	15
<i>Brewster v. Gage</i> , 280 U. S. 327.....	12
<i>Brown v. Commissioner</i> , 38 B. T. A. 298.....	32
<i>Burk-Waggoner Oil Ass'n v. Hopkins</i> , 269 U. S. 110.....	14
<i>Burnet v. Harmel</i> , 287 U. S. 103.....	9, 14
<i>Cawker v. Dreulzer</i> , 197 Wis. 98.....	19, 20, 21
<i>Chase Nat. Bank v. United States</i> , 278 U. S. 327.....	34
<i>Clark v. Williard</i> , 294 U. S. 211.....	34
<i>Commissioner v. Nevius</i> , 76 F. (2d) 109, certiorari denied, 296 U. S. 591.....	12, 35
<i>Dana v. Murray</i> , 122 N. Y. 604.....	20
<i>Duignan v. United States</i> , 274 U. S. 195.....	34
<i>Farmers' Loan & Trust Co. v. Shaw</i> , 58 Misc. 201, 107 N. Y. S. 337.....	20

Cases—Continued.

	Page
<i>Fidelity-Philadelphia Trust Co. v. McCaughn</i> , 34 F. (2d) 600, certiorari denied, 280 U. S. 602	12, 17, 33, 34
<i>Freuler v. Helvering</i> , 291 U. S. 35	15
<i>Heiner v. Mellon</i> , 304 U. S. 271	14
<i>Helvering v. Grinnell</i> , 294 U. S. 153	12, 34
<i>Helvering v. Reynolds Co.</i> , 306 U. S. 110	12
<i>Hepburn v. Commissioner</i> , 37 B. T. A. 459	31, 32
<i>Johnstone v. Commissioner</i> , 76 F. (2d) 55, certiorari denied, 296 U. S. 578	12
<i>Lang v. Commissioner</i> , 304 U. S. 264	15
<i>Lather's Will, In re</i> , 137 Misc. 222, 243 N. Y. S. 380	20
<i>Lee v. Commissioner</i> , 57 F. (2d) 399, certiorari denied, 286 U. S. 563	34
<i>Leaser v. Burnet</i> , 46 F. (2d) 756	12, 16, 17
<i>Lyeth v. Hoey</i> , 305 U. S. 188	13, 14, 15
<i>McFeely v. Commissioner</i> , 296 U. S. 102	12
<i>Minis v. United States</i> , 66 C. Cls. 58, certiorari denied, 278 U. S. 657	34
<i>Morrissey v. Commissioner</i> , 296 U. S. 344	12
<i>Nichols v. Coolidge</i> , 274 U. S. 531	35
<i>Old Colony Trust Co. v. Commissioner</i> , 73 F. (2d) 970	12, 34
<i>Palmer v. Bender</i> , 287 U. S. 551	14, 15
<i>Poe v. Seaborn</i> , 282 U. S. 101	15
<i>Reinecke v. Northern Trust Co.</i> , 278 U. S. 339	34
<i>Saltonstall v. Saltonstall</i> , 276 U. S. 260	34
<i>Sharp v. Commissioner</i> , 303 U. S. 624	15
<i>Stratton v. United States</i> , 50 F. (2d) 48, certiorari denied, 284 U. S. 651	12, 18, 31
<i>Thomas v. Perkins</i> , 301 F. S. 655	14, 15
<i>United States v. Field</i> , 255 U. S. 257	12
<i>Weiss v. Wiener</i> , 279 U. S. 333	14, 15
<i>Whitlock-Rose v. McCaughn</i> , 21 F. (2d) 164	12, 16, 17
<i>Will of Zweifel</i> , 194 Wis. 428	19
<i>Zellerbach Co. v. Helvering</i> , 293 U. S. 172	34

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, Sec. 402	8, 11, 12, 35
Revenue Act of 1926, c. 27, 44 Stat. 9, as amended:	
Sec. 302 (U. S. C., Title 26, Sec. 411)	2
New York Real Property Law, Sec. 134	20
Statutes of Wisconsin, 1933:	
Sec. 232.01	36
Sec. 232.02	36
Sec. 232.03	36
Sec. 232.04	36
Sec. 232.05	36
Sec. 232.06	36
Sec. 232.07	36
Sec. 232.08	37

Statutes—Continued.

Statutes of Wisconsin, 1933—Continued.

	Page
Sec. 232.09.....	37
Sec. 232.10.....	37
Sec. 232.11.....	37
Sec. 232.12.....	37
Sec. 232.19.....	37
Sec. 232.20.....	37
Sec. 232.36.....	38
Sec. 232.40.....	38
Sec. 232.51.....	38

Statutes of Wisconsin, 1937:

Sec. 232.02.....	19
Sec. 232.05.....	18
Sec. 232.06.....	19

Miscellaneous:

Farwell on <i>Powers</i> (2nd ed.), p. 7.....	12
Griswold, <i>Powers of Appointment and the Federal Estate Tax</i> , 52 Harv. L. Rev. 929, 942.....	18
H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21-22.....	11
Sugden on <i>Powers</i> (8th ed.), p. 394.....	13
Treasury Regulations 37 (1919 ed.), Art. 30.....	41
Treasury Regulations 63 (1922 ed.), Art. 25.....	11
Treasury Regulations 68 (1924 ed.), Art. 24.....	31
Treasury Regulations 70 (1926 ed.), Art. 24.....	11
Treasury Regulations 70 (1929 ed.), Art. 24.....	11
Treasury Regulations 80 (1934 ed.), Art. 24.....	2, 11
Treasury Regulations 80 (1937 ed.), Art. 24.....	11
Underhill on the <i>Law of Wills</i> (1900 ed.), Vol. 2, pp. 1163, 1176.....	13

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91-96) is reported in 36 B. T. A. 588. The opinion of the Circuit Court of Appeals (R. 112-122) is reported in 103 F. (2d) 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1939. (R. 124.) The petition for writ of certiorari was filed July 19, 1939, and was granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain powers of appointment, which the decedent exercised by her last will, were general powers of appointment within the meaning of Section 302 (f) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. [U. S. C., Title 26, Sec. 411.]

Treasury Regulations 80 (1934 ed.):

ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised

by will and such donee dies after the enactment of the Revenue Act of 1918. * * *

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate. * * *

Pertinent provisions of the Wisconsin statutes upon which petitioner relies are set forth in the Appendix, *infra*, pp. 36-38.

STATEMENT

The facts as stipulated (R. 75-90) and as found by the Board of Tax Appeals (R. 91-93) may be summarized as follows:

The decedent, Elizabeth S. Morgan, died testate on May 3, 1933, a resident of the State of Wisconsin, and petitioner is the duly appointed executor of her last will and testament (R. 75, 91.) The decedent was the daughter of Isaac Stephenson, who died testate on March 15, 1918, likewise a resident of the State of Wisconsin (R. 91.)

Shortly before his death Isaac Stephenson by deed (R. 13-37) conveyed certain property in trust for a period to end twenty-one years after the death of himself and his wife. The trust deed provided that after the donor's death the trust property should be divided into parts and one part allocated to each beneficiary. The following provisions of the deed of trust related to decedent (R. 18-19, 92-93):

7. After my death and during the continuance of the trust hereby created, said Trustees shall

pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).

If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).

If my daughter Elizabeth S. Morgan should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.

If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment * * * or making an appointment * * * should fail to dispose of the entire net annual income of said part five (5) or of the property constituting said part five (5) at the termination of said trust, then and in any such event the annual income from said part five (5), or the part thereof not disposed of * * * shall be paid annually by said Trustees to her issue surviving * * *; and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), or the part thereof not disposed of * * * to the then surviving issue of my said daughter, * * *.

In addition to this *inter vivos* trust, Isaac Stephenson also created a testamentary trust. By his will (R. 38-73) he devised his residuary estate in trust for the benefit of his wife, his children and certain of his grandchildren. The trust estate was divided into nine equal parts and the trustees were directed to hold one of such parts for the benefit of each of the testator's children. Each child was to receive the income from his or her part annually and a certain portion of the principal at the end of four, eight and twelve years after the testator's death, and the entire remaining principal at the end of sixteen years after his death, provided the child was living at the end of each of the four stated periods. The provision for the decedent was as follows (R. 48-49):

Item Fifteen. I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate as aforesaid. * * *

I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) and all property that shall thereafter be added to said part five (5) from any other part. * * *

The testamentary trust further provided that, should decedent die without exercising the power of appointment, the then undistributed portion of her part should go to her issue and, in the event of her death without issue, the then undistributed portion of her part should

be equally divided and distributed among the other remaining parts into which the estate was divided (R. 49-50).

Both the will and the deed of trust contained a provision (will, R. 61-62; deed of trust, R. 26-27) that whenever in the judgment of the trustees there was danger that any portion of the trust property, whether income or corpus, coming to "any beneficiary" of the trust, would be "dissipated or improvidently handled through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influences of others affecting business capacity, or for any other reason or reasons" the trustees should withhold "from every such beneficiary" the whole or any portion of the trust property, whether of income or corpus. Both instruments further provided that in the event of such a withholding the trustees might pay to the unworthy beneficiary only so much of the portion, otherwise coming to the beneficiary, as the trustees deemed advisable, or might expend the income or corpus for the benefit or support of the unworthy beneficiary. In addition the trust deed provided (R. 27) that whatever was "once withheld, as above provided, from any such unworthy beneficiary" and not expended for his or her benefit and support, should be paid by the trustees to such issue of the unworthy beneficiary as would have taken the property so withheld, in case the unworthy beneficiary had died intestate at the time of the withholding. In the event of failure of issue the trustees were to distribute the property so withheld among the other then remaining parts of the trust. (R. 27.) Under the testamentary trust, the portion "once withheld" from an

"unworthy beneficiary" and not expended for his or her benefit or support was to be paid and transferred by the trustees "to such other worthy beneficiaries under my will" as would have been entitled to the property "in case such unworthy beneficiary had died." (R. 61.)

During her life, decedent received the income from the two trusts as directed by her father. She also received the distributions of principal payable to her from the testamentary trust at the end of the fourth, eighth and twelfth years after the death of her father, as provided in his will, but she did not receive the distribution payable to her at the end of the sixteenth year because of her prior death. (R. 76, 93.)

By her last will and testament (R. 79-90), decedent exercised the power of appointment given to her by her father's deed of trust, and also exercised the power of appointment given to her by her father's will as to that portion of the testamentary trust which she would have received, had she lived, at the end of the sixteenth year after her father's death. The appointments were made in the following words (R. 82, 84-85, 93):

Now therefore, by virtue of said power of appointment and in accordance with the provisions of said last will and testament of my father, Isaac Stephenson, I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan, * * *, to receive all property of any and every nature and kind in the hands of said trustees under the will of my father, * * *.

* * * * *

Now therefore, by virtue of said power of appointment and the provisions of said trust deed

so made by my father as aforesaid dated May 12, 1917, I do hereby appoint my husband, J. Earl Morgan, to have and receive * * *

* * * * *

The Commissioner of Internal Revenue determined (R. 11) that both powers which decedent exercised by will were "general" powers of appointment; and that the value of the property passing under the powers should be included in decedent's gross estate, for estate tax purposes, under Section 302 (f) of the Revenue Act of 1926, as amended by Section 803 (b) of the Revenue Act of 1932. The Board of Tax Appeals approved the Commissioner's action (R. 91-96), and the court below affirmed (R. 112-124).

SUMMARY OF ARGUMENT

Section 302 (f) of the Revenue Act of 1926 provides for the inclusion in the gross estate of a decedent of the value of any property passing under a general power of appointment exercised by the decedent by will. This provision has been a part of the federal estate tax law since the enactment of the Revenue Act of 1918. Although neither the 1918 Act nor any subsequent revenue act has defined a "general power of appointment", the Treasury Regulations have consistently defined it as a power to appoint to any person or persons in the discretion of the donee of the power. The repeated reenactment without change of the tax provision shows that Congress has adopted this administrative construction. The decisions of the various Circuit Courts of Appeals, without exception, are in accord with the Treasury Regulations in defining a general power as one to appoint to any person or persons in the discre-

tion of the donee of the power. And in two cases decided by this Court which involved powers to appoint by will to any persons the donee chose, this Court characterized the powers as general in nature.

Petitioner's contention that the determination of whether the powers here involved are general or special depends upon the manner in which such powers are characterized by Wisconsin law is entirely devoid of merit. This Court has consistently held that in the interpretation of the words used in a federal revenue act, it is the will of Congress as expressed in the statute and the decisions construing it, and not the local law, which controls. "The state law creates legal interests but the federal statute determines when and how they shall be taxed." *Burnet v. Harmel*, 287 U. S. 103, 110. Congress clearly did not intend the taxability of property passing under a power of appointment to be dependent upon the divergent characterizations accorded by different states to precisely the same power. The obvious intention of Congress was to provide a uniform rule of nation-wide application.

Moreover, petitioner is, we believe, in error in his interpretation of the Wisconsin law. His contentions with respect to Wisconsin law were rejected by the Board of Tax Appeals after full consideration and, in our view, the decision of the Board in this respect is clearly correct.

Nor is there merit in petitioner's suggestion that certain "spendthrift" provisions in the trust instruments authorizing the trustees to withhold payments from "unworthy" beneficiaries limit the generality of decedent's powers of appointment. Analysis of the

deed of trust and the will clearly indicates, as the court below held, that the trustees' power to withhold applies only to the named beneficiaries of the trust and not to appointees of the named beneficiaries and that the trustees therefore had no veto power whatever over appointments made by decedent. Moreover, it seems clear that, even if the power to withhold did apply to appointees, it would not convert decedent's otherwise general power into a special power.

Petitioner's contention that the application of Section 302 (f) of the Revenue Act of 1926 to this case is invalid as retroactive because the powers of appointment were given to decedent in 1917 and 1918, prior to the first enactment of the tax, is not available to him. The question was not raised by the pleadings before the Board, by the petition for review by the Circuit Court of Appeals, nor by the petition for a writ of certiorari. In any event, the contention is without merit. The tax is not on the grant of the power to the decedent but upon the decedent's exercise of the power, which did not occur until 1933. Since the decedent's exercise of the power is the generating source of the appointee's title, it is clearly a proper subject of the estate tax.

ARGUMENT

I

UNDER SECTION 302 (f) OF THE REVENUE ACT OF 1926 A POWER TO APPOINT TO ANY PERSON OR PERSONS IN THE DISCRETION OF THE DONEE OF THE POWER IS A GENERAL POWER OF APPOINTMENT

The provision in Section 302 (f) of the Revenue Act of 1926 for the inclusion in the gross estate of a decedent of the value of any property passing under a

general power of appointment exercised by the decedent by will has been an integral part of the federal estate tax law since the enactment of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1097, Sec. 402 (e)).¹

Neither the 1918 nor any subsequent revenue act has defined a "general power of appointment." However, in Article 30 of Treasury Regulations 37, promulgated under the Revenue Act of 1918, a general power is defined as "one to appoint to any person or persons in the discretion of the donee." Substantially the same definition has been contained in all later regulations, the only change, until 1937, being the addition of the word "ordinarily" in the 1924 and subsequent regulations.² The repeated reenactment

¹ The House Ways and Means Committee, in recommending amendment of the estate tax law to provide for the inclusion in the gross estate of the decedent of property passing under a general power of appointment, stated (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21-22): "There has also been included in the gross estate the value of property passing under a general power of appointment. * * * A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. * * *"

² Article 25, Treasury Regulations 63 (1922 ed.); Article 24, Treasury Regulations 68 (1924 ed.); Article 24, Treasury Regulations 70 (1926 and 1929 eds.); Article 24, Regulations 80 (1934 ed.). The 1937 edition of Treasury Regulations 80 added a few phrases to make the definition read as follows: "Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors."

without change of the provisions first contained in the Revenue Act of 1918 relating to property passing under a general power of appointment, in the light of the administrative definition of a general power, shows that Congress has adopted the administrative construction. *McFeely v. Commissioner*, 296 U. S. 102, 108; *Morrissey v. Commissioner*, 296 U. S. 344, 355; *Helvering v. Reynolds Co.*, 306 U. S. 110, 114-115; *Brewster v. Gage*, 280 U. S. 327, 337.

Judicial decision, without exception, has been in accord with the Treasury Regulations in defining a general power as one to appoint to any person or persons in the discretion of the donee of the power. *Johnstone v. Commissioner*, 76 F. (2d) 55 (C. C. A. 9th), certiorari denied, 296 U. S. 578; *Commissioner v. Nevius*, 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591; *Old Colony Trust Co. v. Commissioner*, 73 F. (2d) 970 (C. C. A. 1st); *Stratton v. United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Leser v. Burnet*, 46 F. (2d) 756 (C. C. A. 4th); *Blackburne v. Brown*, 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co. v. McCaughn*, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164 (C. C. A. 3d). Although this Court has never had occasion to pass specifically on the question, its opinions in *United States v. Field*, 255 U. S. 257, and *Helvering v. Grinnell*, 294 U. S. 153, characterized the powers there involved, which were powers to appoint by will to anyone whom the donee chose, as "general powers." See also Farwell on *Powers* (2d ed.), p. 7; Underhill on the

Law of Wills (1900 ed.), Vol. 2, pp. 1163, 1176; Sugden on *Powers* (8th ed.), p. 394.

Petitioner does not deny that, apart from certain "spendthrift" provisions of the trust instruments, which are discussed in point II *infra*, the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion, but contends that the determination of whether such a power is "general" or "special" within the meaning of the Revenue Act depends upon the manner in which such a power is characterized under Wisconsin law, rather than upon the interpretation which the federal courts have given to the federal tax statute. Petitioner urges that, under Wisconsin law, the power vested in the decedent is characterized as "special."

For the reasons stated below (pp. 18-22, *infra*) we believe petitioner to be in error in his interpretation of the Wisconsin law. But, in our view, Wisconsin law as to what constitutes a general or a special power of appointment is entirely immaterial to the decision of this case; if, under Wisconsin law, the language of the will and deed of trust vested in the decedent unlimited power to appoint to any person or persons, the power satisfies the definition of a general power as that term is used in Section 302 (f), however the power may be characterized by the Wisconsin law.

There is an impressive list of decisions by this Court holding that in the interpretation of the words used in a federal revenue act, it is the will of Congress as expressed in the statute and the decisions construing it, and not the local law, which controls. *Lyeth v. Hoey*,

305 U. S. 188, 193; *Heiner v. Mellon*, 304 U. S. 271, 279; *Thomas v. Perkins*, 301 U. S. 655, 659; *Palmer v. Bender*, 287 U. S. 551, 555-556; *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 310-311; *Burnet v. Harmel*, 287 U. S. 103, 110; *Weiss v. Wiener*, 279 U. S. 333, 337; *Burk-Waggoner Oil Ass'n. v. Hopkins*, 269 U. S. 110.

As pointed out in *Burnet v. Harmel*, *supra*, state law creates legal interests but the federal law determines when and how they shall be taxed. There this Court held that a Texas gas and oil lease, which under Texas law was classified as a sale, was not the type of transaction constituting a sale within the contemplation of the federal statute taxing capital gains. The guiding principle was stated as follows (287 U. S. at 110):

Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation wide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. * * *

More recently, in *Lyeth v. Hoey*, 305 U. S. 188, a case dealing with the federal estate tax, this Court recognized that the taxpayer's status as an heir was to be determined by state law, but that when, pursuant to a compromise agreement among the heirs, a distribution

was made, the question whether the property so received was "acquired by inheritance", within the meaning of the federal taxing statute, was necessarily a federal question, determination of which could not be affected by "local characterization" (p. 193).

Even apart from these authorities, it seems entirely clear as a matter of principle that Congress did not intend the taxability of property passing under a power of appointment to be dependent upon the divergent characterizations accorded by different states to precisely the same power. The obvious intention of Congress was to provide a uniform rule of nation-wide application. See *Lyeth v. Hoey*, *supra*, at 194; *Thomas v. Perkins*, 301 U. S. 655, 659; *Burnet v. Harmel*, *supra*, at 110; *Weiss v. Wiener*, *supra*, at 337.

There is nothing to the contrary in the decisions of this Court upon which petitioner relies: *Lang v. Commissioner*, 304 U. S. 264; *Sharp v. Commissioner*, 303 U. S. 624; *Blair v. Commissioner*, 300 U. S. 5; *Frueler v. Helvering*, 291 U. S. 35; *Poe v. Seaborn*, 282 U. S. 101. All of these cases merely hold that state law is controlling in determining the nature of the legal interest which the taxpayer had in the property or income subject to taxation. They do not hold or suggest that, after the nature of such interest is established, the descriptive terminology which may be applied to the interest by local law is relevant in determining whether it comes within the terms of the revenue act. Cf. *Palmer v. Bender*, 287 U. S. 551, 555-556.

Blair v. Commissioner, *supra*, is typical of these cases. The question there involved was whether the

beneficiary of a testamentary trust was taxable upon trust income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly. This Court held (p. 9) that the question whether the trust was a spendthrift trust, barring voluntary alienation of his interest by the beneficiary, depended upon local law. But having determined that, according to local law, the trust was not a spendthrift trust and the assignments were therefore valid, the Court stated (p. 11) that the remaining question—i. e., whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act—was a federal question.

Leser v. Burnet, 46 F. (2d) 756 (C. C. A. 4th), and *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164 (C. C. A. 3d), upon which petitioner places great reliance, are in entire accord with the position for which we contend. In *Leser v. Burnet*, which likewise involved a transfer of property passing under the exercise of a power of appointment, the court first determined, independently of any local statute or court decision, the meaning of "general power" as used in the revenue act and held that such a power is "one which may be exercised by the donee of the power in favor of any person whomsoever including the donee himself or his own creditors" (46 F. (2d) at 758). The court then said that it was necessary to determine whether the particular power involved was "a general power within this meaning of the act of Congress" and stated that this was to be determined by the law of Maryland (p. 760). Since, under Maryland law, the power in question could not

be exercised in favor of the donee's creditors, the court concluded that it did not come "within the meaning of a general power of appointment as that term is used in the language of the revenue act" (p. 761). Thus the same approach was used in the *Leser* case as in the case at bar: state laws were examined to determine the precise scope of the power created by the language in the grant and, this having been determined, the question of whether a power of such scope came within the definition of a general power for purposes of the revenue act was decided as a matter of federal law.

Whitlock-Rose v. McCaughn, *supra*, enunciates the same principle. The question there involved was whether a power of appointment exercisable only by will was a general power within the meaning of the revenue act. The court, interpreting the Act to cover any power in which there was no restriction as to appointees, even though there was a restriction as to the method of appointment, held the power there involved to be general because under state law the donee of such a power was subject to no limitations in the choice of his appointees and the property subject to the power was subject to the donee's debts.²

² The court's statement in the *Whitlock-Rose* opinion (p. 165) that "The law of New Jersey controls this case," when read in its context in the opinion as a whole, obviously refers only to the state law with respect to the scope of the power. If this were not otherwise perfectly clear, it is made so by the subsequent decisions of the same court in *Fidelity-Philadelphia Trust Co. v. McCaughn*, 34 F. (2d) 600, and *Blackburne v. Brown*, 43 F. (2d) 320, holding, in accord with the decision of the court below in the present case, that the meaning which state law attributes to the term "general power of appointment" is not binding upon the federal courts in construing those words in the revenue acts.

The Wisconsin statute upon which petitioner relies in the present case to change an otherwise general power into a special power in no way restricts the donee's selection of appointees; it provides merely that a power authorizing the alienation of an estate or interest less than a fee shall be deemed special. While, as pointed out below (pp. 21-22, *infra*), we do not believe that the power here involved is special within the meaning of that statute, it seems entirely clear that the statute could not in any event affect the operation of the federal taxing act. The tax here is not on property but on the privilege enjoyed by the decedent in the exercise of a power. *Stratton v. United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651. The Revenue Act is obviously concerned with the latitude of the power rather than with the quantum of the estate passed pursuant to its exercise, for the tax is imposed upon "any property" passing under a general power of appointment. There is no basis for reading into the statute the qualification that the property must be a fee simple estate. Consequently it is immaterial that, under the Wisconsin law, the power here involved might possibly be classified as "special" because it might be held to authorize the alienation of less than a fee. See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 942.

The Wisconsin statute relied upon provides as follows (Wis. Stats. 1937, ch. 232):

SEC. 232.05: General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the

lands embraced in the power, to any alienee whatever.

232.06. Special Power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

These statutory provisions in terms apply only to real estate, for Section 232.02 defines a power, as used in the statute, as "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." However, in *Will of Zweifel*, 194 Wis. 428, 216 N. W. 840, the Supreme Court of Wisconsin stated (p. 436) that, although the statute applies only to real estate, it "shows the legislative purpose, which ought to be followed in the disposition of personalty." And in *Cawker v. Dreutzer*, 197 Wis. 98, 221 N. W. 401, the court went a step further by holding (p. 132) that the statute "applies the same rule to both real and personal property."

Under the rule of these cases it is clear that the general statutory scheme applies to personalty. But there is more difficulty in applying to personalty the specific provisions of Section 232.06, defining a special power as one which "authorizes the alienation * * * of a particular estate or interest less than a fee." There is, of course, no "estate or interest" in personal property which may properly be denominated a "fee", and the provision may therefore be applied, if at all, only by analogy.

By the provisions of the testamentary trust, a part of the trust property was held in trust for the benefit

of the decedent for life, but upon her death was to be paid outright to her appointees. While decedent may be said to have had merely a life estate, rather than a "fee" interest, in the trust property, the interest of her appointees who received the property outright seems clearly to be analogous to a "fee." As a matter of principle, therefore, the power vested in the decedent under the testamentary trust should be considered analogous to a power to authorize the alienation of the trust property in fee and, therefore, to be a "general" power within the Wisconsin statute. And the same conclusion should, we believe, be reached with respect to decedent's power under the *inter vivos* trust, where her appointees, instead of receiving the trust property outright immediately upon decedent's death, were to receive the income from the property until the termination of the trust and thereafter the principal.

We have been able to find no decision directly on the point in Wisconsin. However, in *Cawker v. Dreutzer*, *supra*, the Supreme Court of Wisconsin stated that the Wisconsin statute on powers, being "derived by adoption from New York, should have the same interpretation here as there * * *" (p. 132). The statutes of the two states are almost identical. See New York Real Property Law, Section 134. It is therefore of great significance that, under the law of New York, a power of appointment such as those involved in the present case is considered a general power. *In re Lathers' Will*, 137 Misc. 222, 243 N. Y. Supp. 380; *Farmers' Loan & Trust Co. v. Shaw*, 56 Misc. 201, 107 N. Y. Supp. 337; cf.; *Dana v. Murray*, 122 N. Y. 604.

Cawker v. Dreutzer itself is not, as urged by petitioner, authority for holding these powers to be special in character. That case involved a testamentary trust which provided that the income from one part of the trust property was to be paid to the plaintiff for life and that, upon her death, the principal of that part was to be paid to the appointees named by her in her will, or, in default of appointment, to certain specified legatees. Plaintiff contended that since she had a life estate in the property and an absolute power to dispose of the whole estate by will, the two estates merged and she had absolute title to the property. She relied on Section 232.08 of the Wisconsin statutes (*infra*, p. 37) providing for such a merger in the event that the owner of a life estate receives "an absolute power of disposition" of the property. The court rejected the plaintiff's contention, holding that a person has "an absolute power of disposition" within the meaning of the statute only when he can dispose of the entire fee during his lifetime for his own benefit. See Section 232.12, *infra*, p. 37. The court pointed out that the testator had intended that plaintiff should not have power to alienate the property during her life and had reserved to himself the naming of the line of descent in case plaintiff failed to exercise her power of appointment. This was deemed to be an effective bar to considering the power of appointment as a power of absolute disposition of the estate.⁴

⁴ The statement in petitioner's brief (p. 35) that "The 'absolute power of disposition' prayed for in the complaint is a synonym for 'general power of appointment'" is clearly erroneous. As the court held in *Cawker v. Dreutzer*, an "absolute power of disposi-

It is true that the court stated at the end of its opinion that the power which plaintiff had was a "special power under subdivision (2), § 232.06, because it embraces an interest less than a fee", but this statement was, as the Board of Tax Appeals held in the present case (R. 95-96), mere dictum, unnecessary and indeed irrelevant to the decision of the question presented. It does not appear that the point was argued before the court and the parties apparently made no issue as to the nomenclature prescribed in Wisconsin for such a power of appointment as plaintiff possessed. Under these circumstances, we believe that the Board of Tax Appeals was clearly correct in holding (R. 96) that the dictum should not be taken as decisive, and that, in the light of the language of the statute and of the New York decisions, the powers should be deemed to be general under Wisconsin law.

We reiterate, however, that the mere definition of general power by a state statute is not controlling in the application of the federal revenue laws. State law is looked to only to determine whether or not the rights which are taxed by the federal law exist. Under the law of Wisconsin, the decedent in the present case clearly had the right to appoint the property in question to any person or persons, and under federal law this is considered a general power of appointment.

tion" means an absolute power to dispose of the property either by deed or by will, and does not comprehend a power to appoint by will alone. See Section 232.12 of the Wisconsin statutes, *infra*, p. 37. Under Section 232.05 of the Wisconsin statutes, on the other hand, a general power may be one limited to alienation by will alone.

II

THE "SPENDTHRIFT" PROVISIONS OF THE TRUST INSTRUMENTS
DO NOT LIMIT THE GENERALITY OF DECEDENT'S POWERS OF
APPOINTMENT

The powers of appointment given to decedent are in terms unrestricted. The deed of trust provides that if the decedent should die prior to the termination of the trust, the trustees should pay the income from her share "to such person or persons as she may appoint by her last will and testament", and at the termination of the trust should transfer the corpus of that share "to such person or persons as she may appoint in the manner aforesaid" (R. 18-19). Similarly, the testamentary trust provides (R. 49):

I give, devise and bequeath *to the appointee or appointees of my daughter Elizabeth Morgan by her last will and testament* all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) and all property that shall thereafter be added to said part five (5) from any other part. [Italics supplied.]

There is in this language no restriction or qualification and none should be read into it unless the intent of the donor to vary the explicit language which he used is clearly apparent from other provisions of the trust instruments, reading those instruments as a whole.

Petitioner purports to find such a restriction in certain "spendthrift" provisions contained in Article 15 of the deed of trust and Item 26 of the will. These provisions authorize the trustees to withhold payments of income or principal from "any beneficiary" under

the trust they deem to be "unworthy". Petitioner contends that these provisions give the trustees an effective veto power over the exercise of decedent's power of appointment and thus prevent that power of appointment from being general in character. The answer is two-fold: first, analysis of the deed of trust and the will clearly indicates, as the court below held, that the trustees' power to withhold applies only to named beneficiaries of the trust and not to appointees of the named beneficiaries; and, second, even if the power to withhold did apply to appointees, it would not change the character of decedent's power of appointment from a general to a special power.

**1. THE TRUSTEES' POWER TO WITHHOLD DOES NOT APPLY TO APPOINTEES
OF NAMED BENEFICIARIES**

The provisions of Article 15 of the deed of trust and Article 26 of the will are very similar. For convenience of analysis, therefore, attention will be directed primarily to Article 15 of the deed of trust, every consideration adverted to, however, being equally applicable to Item 26 of the will.

The first paragraph of Article 15 is as follows (R. 26):

15. Whenever, in the judgment of said Trustees, there shall be danger that any portion or portions of the trust property *coming to any beneficiary under this trust*, whether income or corpus, as hereinbefore provided, will be dissipated or improvidently handled through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influences of others affecting business capacity, or for any

other reason or reasons, said Trustees shall withhold, if they deem it best, from every such beneficiary the whole or any and each portion of the trust property, whether of income or corpus, coming to such beneficiary as unworthy to receive the same, and said Trustees shall pay and transfer to every such beneficiary only so much of said trust property, whether of income or corpus, otherwise coming to such beneficiary, as said Trustees shall deem advisable. *Said trustees shall, if they deem it best, instead of paying and transferring to any such beneficiary or beneficiaries any portion of said trust property, whether of income or corpus, expend the same, or any portion thereof, for the welfare and support of such unworthy beneficiary or beneficiaries.* [Italics supplied.]

The court below, analyzing the power to withhold conferred by this provision, concluded that it applied only to payments to named beneficiaries and not to payments to appointees of named beneficiaries. This conclusion, we submit, accurately reflects the donor's intention as expressed in the trust instrument looked at as a whole. The interpretation urged by petitioner not only disregards the apparent purpose of Article 15, but leads to absurd results which the donor could not have intended.

The purpose of giving the trustees the power to withhold was obviously to protect the donor's widow, children and grandchildren against their own possible improvidence. In the preamble to the trust, the donor expressly stated (R. 13) that it had been his observation that many widows and children have been unable to preserve properly the principal of the fortunes they have

inherited and that it was his desire to provide for the support of his wife and his children and his grandchildren, so that his wife should always have a sufficient income and so that his children and grandchildren should be assured a comfortable living for many years after his death. Carrying out this purpose, the donor made provision in the trust instrument for his widow, for the children of a deceased son and the children of a deceased daughter, and for another son and five daughters. These were the objects of his particular regard and solicitude. For his children he provided that, after his death and during the continuance of the trust, each should receive the net income from one part of the trust for life. If any child should die prior to the termination of the trust, the income and corpus of that part was to go to his or her appointees, or, in default of appointment, to his or her issue.

The interest of the donor in the parts of the trust set aside for his children, including that set aside for the decedent, was clearly to assure, so far as he was able, that his children would be adequately provided for during their lifetime. To accomplish this purpose he authorized the trustees, whenever they believed there was danger of dissipation of the trust property, to withhold payments from any beneficiary under the trust they deemed "unworthy" and, if they deemed it best, to expend the portion of the trust property to which such beneficiary was otherwise entitled for the welfare and support of the beneficiary. But the donor had no such interest in preserving the trust property from dissipation once his children were dead. He did not give

vested remainder interests to the issue of his children or to any particular class or classes of persons in whom he had an interest. Instead, under the trust deed each child received an unrestricted power of appointment, without any power in the trustees to veto the appointment made. The grant of such an unrestricted power of appointment is certainly inconsistent with the view that, once the appointment has been made, the trustees are under a duty to preserve the trust property from dissipation and to protect the appointees from their own improvidence.

And the provision charging the trustees with the duty of expending the trust property "for the welfare and support" of unworthy beneficiaries clearly does not apply to appointees. The beneficiaries may have appointed their creditors, corporate or otherwise; they may have appointed a charity; they may have appointed complete strangers. Certainly the donor was not concerned with whether his children's creditors, or some charity, or some stranger to himself, would properly handle the property appointed to ~~them~~, and certainly did not intend that his trustees should expend the trust property for their "welfare and support". As the court below observed (R. 121): "There is nowhere in either trust instrument any indication of interest in the welfare of appointees or their issue."

The conclusion that the trustees' power to withhold was intended to apply only to the named beneficiaries and not to their appointees is given conclusive support by the provision made in Article 15 for the disposition of payments withheld from an "unworthy beneficiary"

and not expended for his or her welfare and support. The provision is as follows (R. 27):

Whatever shall have been once withheld, as above provided, from any such unworthy beneficiary under this trust and shall not have been expended by such Trustees for the benefit and support of such unworthy beneficiary, *shall be paid and transferred by said Trustees to such of his or her issue as would have taken the property so withheld, both income and corpus, in case such unworthy beneficiary had died intestate at the time of such withholding; and in the event of there being no such issue at the time any such trust property shall be payable or transferable, then said Trustees shall pay and transfer and distribute such property so withheld to and among the then other existing remaining parts.* [Italics supplied.]

As applied to the donor's children—the named beneficiaries—this provision is entirely workable since the trust deed provides for the disposition of each child's share of the trust property to his issue in the event that the child dies intestate—i. e., fails to exercise his power of appointment by will. But the provision is meaningless if interpreted to apply to an appointee, since the trust deed makes no provision whatever for payments of income or corpus to the issue of an appointee if the appointee dies intestate before the termination of the trust. The trustees could not, therefore, pay any funds withheld from an appointee and not expended for his benefit to “such of his or her issue as would have taken the property so withheld * * * in case such unworthy [appointee] had died intestate at the time of such withholding.” And, even apart from this, it is

not likely that the donor would be solicitous for the welfare of the issue of appointees. If the donor's children should appoint their creditors, or strangers, as they clearly had a right to do, it would have been of no interest to the donor to have the property go to the issue of these appointees rather than to the appointees themselves. Moreover, a corporation might be appointed, and of course it could not die intestate or with issue.

The comparable provision of Item 26 of the will with respect to withheld and unexpended payments—the only portion of Item 26 which is in any material respect different from Article 15 of the deed of trust—shows equally clearly the inapplicability to appointees of the trustees' power to withhold. The provision is as follows (R. 61):

Whatever shall have been once withheld as above provided from any such unworthy beneficiary under my will and shall not have been expended by said trustees for the benefit and support of such unworthy beneficiary, *shall be paid and transferred by said trustees to such other worthy beneficiaries under my will who would have been entitled thereto in case such unworthy beneficiary had died.* [Italics supplied.]

If an appointee is to be considered as a beneficiary under the will of the donor, as the petitioner urges, the trustees cannot identify the "worthy beneficiaries" under the will who are to receive withheld and unexpended payments, until the death of an "unworthy beneficiary" who holds a power of appointment. This follows from the fact that by the terms of the will the issue of a named beneficiary who holds a power of ap-

pointment receive the beneficiary's property interest in the testamentary trust only if the beneficiary does not exercise his power of appointment by will. Thus, if an appointee is considered a beneficiary, it cannot be determined until the death of the named beneficiary who are the "worthy beneficiaries" under the will "who would have been entitled" to the payments "in case such unworthy beneficiary had died." Obviously the intent of the testator, as expressed in the terms of the testamentary trust, was that the trustee should be able to select the worthy beneficiaries at the very time the payments were withheld from an unworthy beneficiary, which could not be done under the construction of Item 26 urged by petitioner.

Another consideration compelling the same conclusion is that under the testamentary trust, although not under the *inter vivos* trust, an appointee is entitled to the immediate possession and enjoyment of all property in the hands of the trustees at the death of the beneficiary who appointed him. This is clearly inconsistent with an intention on the part of the testator to have the trustees' power to withhold applied to appointees, since, as the court below pointed out (R. 120-121), the grant to the trustees of a power to withhold presupposes a period during which the beneficiaries do not have possession and full enjoyment of the trust property.

One other factor should be noted. In his will, the testator made the exercise of the powers of appointment granted to two of his children conditional upon their dying without issue (R. 54, 57). In the case of the

other four children, including the decedent, the right to exercise the power was not subject to this condition (R. 47, 49, 51, 52). This distinction between the conditions upon which the several powers were given strengthens the view that decedent's right to exercise the appointment was absolute. In the words of the court below (R. 121), "Having carefully chosen the grantees of powers of appointment, the testator evidenced no intention of controlling whatever property passed to any appointees."

2. EVEN IF THE TRUSTEES' POWER TO WITHHOLD DID APPLY TO APPOINTEES, DECEDENT'S POWER OF APPOINTMENT WOULD STILL BE GENERAL IN CHARACTER

Even if the trustees' power to withhold should be construed as applying to appointees, that would not change the character of decedent's power of appointment from a general to a specific power. Decedent would still have power to appoint to anyone she pleased, without restriction or limitation, and without any necessity for securing prior consent of the trustees. The only effect of the trustees' power to withhold would be to place a possible limitation upon what the appointees would receive through the appointment; it would place no limitation whatever upon the exercise of the power. As pointed out above, the test of a general power of appointment for purposes of the federal estate tax is the latitude of the decedent's power of disposition rather than the quantum of the interest of which the decedent may dispose (see p. 18, *supra*). The case is very different from *Hepburn v. Commissioner*, 37 B. T. A. 459, cited by petitioner, where the decedent

could exercise the power of appointment only with the written permission and approval of the trustees. Here the decedent was left free to exercise the power vested in her in any way she pleased, and the trustees' power to withhold came into operation, if at all, only after the appointment had been made and had become effective.

Shortly after deciding *Hepburn v. Commissioner, supra*, the Board of Tax Appeals was called upon to decide *Brown v. Commissioner*, 38 B. T. A. 298, which presented the very question now under consideration arising under the same trusts as are here involved. A sister of the decedent in the case at bar had died, having exercised the power of appointment given to her by her father, and her executors contended before the Board, as petitioner contends here, that the trustees' power to withhold made the decedent's power of appointment special rather than general in character. The Board rejected the contention. It expressed great doubt whether the provisions for withholding applied to appointees, but, assuming for purposes of decision that they did so apply, held that they did not render special the otherwise general power, because "they are concerned only with the method of payment of income and principal, and do not withdraw or alter in substance the beneficial enjoyment of the income or principal by the person or persons designated pursuant to the power of appointment" (p. 301).

The reason a distinction is made between a general and a special power for purposes of the estate tax is the belief that where the original testator has limited the right to appoint to certain named beneficiaries or

to a limited class of beneficiaries, it is he and not the donee of the power who in the broadest sense transmits the property to the appointees. The donee's exercise of such a limited power is treated merely as a stage in the original scheme of inheritance rather than as an independent source of transmission. See *Fidelity-Philadelphia Trust Co. v. McCaughn*, 34 F. (2d) 600, 604 (C. C. A. 3d), certiorari denied, 280 U. S. 602. This cannot be said of decedent's power of appointment in the case at bar. Whether the trustees have a power to withhold from appointees or not, it is the decedent, and not her father, who is in every real sense the source of the transmission to the appointees of whatever trust property they may receive. This being so, the power must be deemed general and the property passing pursuant to the power must be included as part of the gross estate of the decedent.

III

THE APPLICATION OF SECTION 302 (F) OF THE REVENUE ACT OF 1926 TO PROPERTY PASSING UNDER POWERS OF APPOINTMENT EXERCISED IN 1933 ALTHOUGH VESTED PRIOR TO THE FIRST ENACTMENT OF THE TAX IS NOT INVALID AS RETROACTIVE

Petitioner contends that the application of Section 302 (f) of the Revenue Act of 1926 to this case is invalid as retroactive because the powers of appointment were given to decedent in 1917 and 1918, prior to the first enactment of the tax, although the powers were not exercised until May 3, 1933, the date of decedent's death. This question was not raised by the pleadings before the Board of Tax Appeals (R. 2-8), by the petition for review by the Circuit Court of Appeals

(R. 101-104), nor by the petition for a writ of certiorari. It should, therefore, be excluded from the scope of review by this Court. *Zellerbach Co. v. Helvering*, 293 U. S. 172, 182; *Clark v. Williard*, 294 U. S. 211, 216; see also *Duignan v. United States*, 274 U. S. 195, 200; *Ana Maria Co. v. Quinones*, 254 U. S. 245, 251.

In any event the contention is without merit. The federal estate tax is a tax upon the privilege of transferring property at death, measured by the value of the interest transferred. *Chase Nat. Bank v. United States*, 278 U. S. 327, 334. There can be no dispute that property passing pursuant to the exercise of a general power of appointment is property transmitted at the death of the donee of the power and that it is the donee's exercise of the power which is the generating source of the appointee's title. It is clear, therefore, that the privilege of exercising such a power is a proper subject of the estate tax and that it is immaterial that the power was given to the decedent prior to the first enactment of the tax. *Lee v. Commissioner*, 57 F. (2d) 399 (App. D. C.); certiorari denied, 286 U. S. 563;⁵ *Stratton v. United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 248 U. S. 651; cf. *Saltonstall v. Saltonstall*, 276 U. S. 260, 271-272; *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 345.⁶

⁵ Disapproved only as to another point in *Helvering v. Grinnell*, 294 U. S. 153.

⁶ In the following cases property passing pursuant to the exercise of a general power of appointment was held subject to the estate tax although the power was vested in the decedent prior to the first enactment of the tax on February 24, 1919: *Minis v. United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657 (power vested in 1851); *Old Colony Trust Co. v. Commissioner*, 73 F. (2d) 970 (C. C. A. 1st) (power vested in 1900); *Fidelity*

Nichols v. Coolidge, 274 U. S. 531, is not to the contrary. That case merely held that property conveyed in trust by transfers completed before the passage of Section 402 (c) of the Revenue Act of 1918 could not, on the donor's death after the enactment of that section, be included as part of the donor's taxable gross estate.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
WARREN F. WATTLES,
Special Assistants to the Attorney General.

RICHARD H. DEMUTH,
Special Attorney.

DECEMBER 1939.

Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602 (power vested in 1902); *Blackburne v. Brown*, 43 F. (2d) 320 (C. C. A. 3d) (power vested in 1911); *Commisisoner v. Nevius*, 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591 (power vested in 1917).

APPENDIX

WISCONSIN STATUTE ON POWERS

Wisconsin Statutes, 1933, c. 232:

232.01 *How far abolished.*—Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction and execution of powers shall be governed by the provisions herein contained.

232.02 *Definition.*—A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

232.03 *Who cannot grant.*—No person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates.

232.04 *Division of powers.*—Powers, as authorized in this chapter, are general or special, and beneficial or in trust.

232.05 *General power.*—A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

232.06 *Special power.*—A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

232.07 *Beneficial power.*—A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

232.08 *Life estate, when changed to fee.*—When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts.

232.09 *Power creates a fee, when.*—When a like power of disposition shall be given to any person to whom no particular estate is limited such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

232.10 *Same subject.*—In all cases where such power of disposition is given and no remainder is limited on the estate of the grantee of the power such grantee shall be entitled to an absolute fee.

232.11 *Power to devise inheritance.*—When a general and beneficial power to devise the inheritance shall be given to a tenant for life or for years such tenant shall be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of sections 232.08 to 232.10.

232.12 *What powers absolute.*—Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.

* * * * *

232.19 *Other powers prohibited.*—No beneficial power, general or special, hereafter to be created, other than such as are enumerated and defined in the preceding sections of this chapter, shall be valid.

232.20 *Rights of creditors.*—Every special and beneficial power is liable to the claims of credi-

tors in the same manner as other interests that cannot be reached by an execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

* * * * *

232.36 *Who may take and convey.*—A power may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands holden by such person.

* * * * *

232.40 *When made by will or devise, how executed.*—When a power of disposition is confined to a disposition by devise or will the instrument must be a will duly executed according to the provisions of law relating to wills of real and personal estate.

* * * * *

232.51 *Power to devise passes by will.*—Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator unless the intent that the will shall not operate as an execution of the power shall appear expressly or by necessary implication.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner herein comes and respectfully prays that said cause be reheard and the opinion of this Court filed on January 29, 1940, be reconsidered because of the mistaken interpretation by the Court of petitioner's argument, written and oral, upon the issues involved in the case in that the Court understood the petitioner to concede that the

decedent, under the powers of appointment held by her, could have appointed to her estate or her creditors; also because of errors of law apparent upon the face of the record.

The decision of the Court is based upon the mistaken assumption on its part that petitioner "conceded that, under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors" (Cert. Op. p. 2). Because of this supposed concession, the Court found that it was immaterial whether the law of Wisconsin had defined a power such as decedent held, to be a special power under the law of Wisconsin, and not a general power of appointment. The Court, also, upon the same supposed concession of petitioner, held that the powers of appointment were "general within the intent of the Revenue Act, notwithstanding they may be classified as special by the law of Wisconsin" (Cert. Op. p. 2).

The Court again said (Cert. Op. p. 3) in connection with its comments upon the case of *Leser v. Burnet*, 46 F. (2d) 756, cited by petitioner, that because petitioner "conceded that the decedent in this case could have appointed to her estate or her creditors," decedent had a general power within the meaning of Section 302f, thus holding, in effect, that because of such concession this case did not fall within the rule of *Leser v. Burnet*.

Petitioner respectfully submits that these statements of the Court admit of no other construction than that the Court's reason for its holding that the powers here are general, within the meaning of the Revenue Act, is the supposed concession by petitioner that Elizabeth S. Morgan, the decedent, under the law of Wisconsin, could have appointed to her estate or her creditors. If the assumption that the petitioner so conceded be erroneous, then the Court

had no law of Wisconsin before it holding that the powers in the Stephenson instruments (or powers similar thereto, as in *Cawker v. Dreutzer*, 197 Wis. 98) permitted the donee to appoint to her estate or her creditors. The petitioner could not have conceded as asserted in this opinion because there is no law, either federal or of the State of Wisconsin, to justify such a concession:

Petitioner's same supposed concession was apparently the reason for the Court's holding that the instant case was not within the rule laid down in *Leser v. Burnet*, for the reason that in *Leser v. Burnet* the petitioner therein denied that, under the law of Maryland, the decedent could have appointed to her estate or her creditors, and in the case at bar the court assumes, albeit mistakenly, that the petitioner *conceded* that, under the law of Wisconsin, the decedent could have appointed to her estate and her creditors.

Petitioner now states to the Court that neither he nor his counsel nor any one representing him has ever conceded, directly or by inference, by written or spoken word, that the decedent could have appointed to her estate or her creditors. On the contrary, the petitioner has constantly and consistently maintained throughout the entire four years in which this case has been presented to the Commissioner, the Board of Tax Appeals, the Circuit Court of Appeals, and this Court, that she did *not* hold a general power of appointment and consequently, that she could not have appointed to her estate or her creditors. The Court says in its opinion that the question here (Cert. Op. p. 1) is "to what extent and in what sense the law of the decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of the statute." The Court held in effect, that when Congress used in the statute the adject-

tive "general" to designate the power to be taxed, Congress had it in mind that the words of the definition of a general power in the regulations as a "power to appoint to any person or persons," meant "anyone, including his own estate or his creditors." In this case, therefore, any references by the court or counsel to "general powers of appointment" mean powers under which the donee may appoint to anyone, including her own estate or her creditors (Cert. Op. p. 3).

Petitioner's arguments in his brief that decedent could not have appointed to her estate or her creditors were ordinarily in the form of his statements that the powers held by decedent were "not general powers of appointment," or were "not general powers of appointment within the intent of the Revenue Act," or "not general powers under the federal law." All these designations mean powers of appointment under which the donee may appoint to his estate or his creditors.

The fact that Section 232.05 of the Wisconsin Statute on Powers defines a general power of appointment to be one to appoint "to any alienee whatever," in no way militates against petitioner's contention that the decedent in the instant case did not, under the law of Wisconsin, hold a general power of appointment. The Supreme Court of Wisconsin in *Cawker v. Dreutzer*, 197 Wis. 98, construed Section 232.05 and held, despite the words "to any alienee" therein, that the words in the Cawker will, to appoint, by will, as distinguished from a "conveyance" or "grant", "to any person or persons," did not give to the donee under that power a general power of appointment. It follows, therefore, that the power of appointment in the Cawker case did not give to the donee, under the law of Wisconsin, "a power to appoint anyone, including her estate or creditors." The holding of the Court in the *Leser*

case, which petitioner also cites in his brief and relies upon, is to the same effect with respect to the law of Maryland and based on the same reasoning.

It is erroneously stated in respondent's brief (p. 13) that "Petitioner does not deny that * * * the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion"; also brief (p. 27) that "The beneficiaries may have appointed their creditors, corporate or otherwise." These statements are most surprising, in view of petitioner's repeated denials in his brief that the decedent held a general power of appointment, under which she could appoint to her estate or her creditors. The most casual reading of petitioner's brief discloses his contention, often stated, that under the authority of the case of *Cawker v. Dreutzer*, 197 Wis. 98, the decedent in the instant case held *only* a special power of appointment and *not* a general power, within the meaning of the federal law. The Court in its opinion agrees that petitioner took this position, by stating (Cert. Op. p. 2) "The petitioner urges that by statute and decision Wisconsin has defined as special a power such as she held." Despite this statement, in the same sentence of the opinion, the Court states (erroneously, as petitioner respectfully submits) that petitioner "conceded that under the law of Wisconsin the decedent could have appointed any one to receive the trust property, including her estate and her creditors."

This very statement of the Court shows the total misapprehension by the Court of petitioner's position, and the Court's error in stating that petitioner conceded that the decedent, holding only a special power, could have appointed to her estate or her creditors.

In support of petitioner's denial that he ever conceded that the decedent could have appointed to her estate or

her creditors, but on the contrary that he constantly pressed upon the Court by oral and written arguments, that she did not hold general powers of appointment and therefore could not have appointed to her estate or her creditors, petitioner presents the following:

A.

During the oral arguments of counsel before the Court on January 4 and 5, 1940, Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?" Counsel for respondent answered: "She could." Counsel for petitioner answered: "She could not." Despite this positive denial by counsel for petitioner, the Court, through some inexplicable misapprehension, held that the petitioner conceded the very thing he so flatly denied.

Inasmuch as the above facts are not apparent of record, petitioner attaches to this petition the affidavit of Brode B. Davis, counsel for petitioner, marked "Exhibit A," and the affidavit of Alvin V. Nygren, associate counsel, marked "Exhibit B," attesting thereto. The affidavit of petitioner stating that he never, personally or through counsel or any other person on his behalf, conceded that the decedent could appoint to her estate or her creditors, is also attached hereto, marked "Exhibit C."

B.

Petitioner's Specification of Error No. 3, Petitioner's Brief (p. 9).

"3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the

State of Wisconsin and the decision of the Supreme Court of that state to the contrary, were immaterial."

A general power is defined by federal law as follows: "Ordinarily, a general power is one to appoint to any person or persons in the discretion of the donee of the power." (Treasury Regs. 80, Art. 24). Under the federal law, the words "any person or persons" include "the donee's estate or his creditors." (Cert. Op. p. 3.)

The petitioner could not have stated more clearly that the will and deed of trust did *not* give the decedent power to appoint to any person or persons in her sole discretion, including her estate and her creditors, than does this Specification of Error to the holding of the Circuit Court of Appeals that she *did* have that power. This Specification of Error conclusively refutes the statement that "petitioner conceded that she could have appointed to her estate or her creditors."

C.

Paragraph IV of Petitioner's Summary of Argument (Br. p. 14).

"The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers. *Cawker v. Dreutzer*, 197 Wis. 98."

It is an established rule of law that the donee under a special power cannot appoint to his estate or his creditors (Cert. Op. p. 3).

The *Cawker* case construed Section 232.05 of Wisconsin statutes, which provides,

"A power is general when it authorizes the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

The Court in the *Cawker* case held, in effect, that the words of the Statutes "to any alienee whatever" did not mean, in the case of an appointment *by will*, that the donee could appoint to her estate or her creditors, and therefore that the donee did not hold a general power of appointment nor an absolute power of disposition.

The Wisconsin Court stated that it based its decision entirely upon the decision of the Court of Appeals of New York in *Cutting v. Cutting*, 86 N. Y. 522, from which case it quoted on that point. (*Cawker v. Dreutzer*, 197 Wis. 134, 135.)

In *Cutting v. Cutting*, a creditor of the donee claimed that the donee held a power of appointment, *by will*, to appoint to anyone; that this was a general power of appointment under the provision in New York Statute of Powers (1 R. S. 732, Sec. 77 (1881)), defining a general power of appointment as one "to appoint to any alienee whatever." The creditor also insisted that under the common law such a power gave to donee the right to appoint to his estate, or his creditors, and if he failed to do so, the property subject to the power became a part of donee's estate for the benefit of his creditors. The Court of Appeals held, however, that notwithstanding the words "to any alienee whatever" in the Statute of Powers, defining a general power of appointment, (from which the Wisconsin Statute on Powers was "borrowed literally,") a power to appoint *by will* (as distinguished from a deed or grant), "to any alienee" was not a general power; that the donee could not exercise it in favor of his estate or his creditors, and the property subject to the power did not become a part of the donee's estate upon his exercise of it. The court accordingly held that the creditor could not recover.

The decision of the Court of Appeals in the *Cutting* case was adopted by the Wisconsin court in *Cawker v. Dreutzer*

as its interpretation of the Statute of Powers in the State of Wisconsin, and it accordingly adopted the holding of the New York Court that a donee of a power to appoint *by will* could not, in Wisconsin, appoint to his estate or his creditors, and thus give to the donee "full dominion over the property as if he owned it" (Cert. Op. p. 3).

Petitioner submits that this Court should have held in the instant case that it was the duty of the Circuit Court of Appeals to examine "the local law to ascertain whether a power would be construed by the state court to permit the appointment of the donee, his estate, or his creditors, and on the basis of the answer to that question determine whether the power was general within the intent of the Federal Act" (Cert. Op. p. 3).

The Circuit Court of Appeals in the *Leser* case found in examining the local law that the Supreme Court of Maryland had held that a power to appoint *by will* "to any person" does not authorize the appointment of the donee, his estate or his creditors. Likewise, the Circuit Court of Appeals in the instant case would have found in examining the local law that the Supreme Court of Wisconsin had made a ruling similar to the ruling of the Supreme Court of Maryland in *Balls v. Dampman*, 69 Md. 390, cited and followed by the Circuit Court of Appeals in *Leser v. Burnet*, 46 F. (2d) 756. The ruling in *Cawker v. Dreutzer* was that the power of appointment in the Cawker will, similar to the powers in the Stephenson instruments, viz: to appoint *by will* "to any person" was not a general power of appointment. That ruling meant that, notwithstanding the words of the Wisconsin Statute "to any alienee whatever," the donee under the power could not appoint to her estate or her creditors.

D.

"Petitioner's Summary of Argument, VIII-A-3, (Brief, p. 16). The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment."

Also, argument of petitioner on page 46 of Brief:

"The language quoted above from the will and deed of trust here is eloquent proof of his intent not to give to his children a general power of appointment, which is equivalent to 'outright ownership,' (*Fidelity Trust Co. v. McCaughn*, 1 F. (2d) 987, 988.)"

Thus petitioner denies that Isaac Stephenson intended to give to the donee what this Court holds was the result of a power to appoint to donee's estate or her creditors, to wit, "as full domination over the property as if he owned it" (Cert. Op. p. 3).

E.

Citation of *Leser v. Burnet*, 46 F. (2d) 756—Petitioner's Brief, p. 18.

Petitioner cited *Leser v. Burnet*, in support of his contention that the powers of appointment held by decedent are not general powers of appointment within the meaning of the federal law.

If petitioner had in fact conceded in this case that the decedent had the right to appoint to her estate or her creditors, how senseless would have been his citation of *Leser v. Burnet*, which holds that the power of appointment in the Leser deed of trust, created by words identical with the words of the powers held by decedent, viz: "to such

persons as she may appoint," did *not* give to the Leser decedent the right to appoint to her estate or her creditors. The holding in the *Leser* case was directly contrary to the petitioner's supposed concession that Elizabeth S. Morgan could appoint to her estate or her creditors.

Petitioner also relied upon the *Leser* case as a federal authority that state courts had the right to hold that a power to appoint *by will*, "to any person or persons," did not permit the donee to appoint to donee's estate or his creditors, and that such a holding was binding on the taxing power of the government. If it is not binding, the Circuit Court of Appeals in the *Leser* case could have ignored the decisions of the Supreme Court of Maryland and determined the taxing case independently of the local law. The petitioner does not understand the court to so hold in its opinion.

In view of the citation of, and reliance by petitioner upon, the case of *Leser v. Burnet* how can it be said that petitioner conceded that the decedent could appoint to her estate or her creditors?

F.

Heading, Petitioner's Brief; Page 31:

"IV. The Supreme Court of Wisconsin has held that the powers of appointment similar to those in question here are special powers and not general powers."

This very heading, which recites that the powers here are special, refutes conclusively the statement that the petitioner had conceded the powers to be general powers within the meaning of the Revenue Act, and that the decedent could have appointed to her creditors. Under *no other* form of power than a general power can a donee ap-

point to his estate or creditors. Such other forms of power are designated variously as "naked," "limited," "particular," and "special" powers. 49 C. J. 1250. In the *Leser* case such a power was designated as "naked." In the *Cawker* case it was designated as "special."

To conclude; In the face of the answer of counsel for petitioner to the question of Mr. Justice Roberts; and the above excerpts from petitioner's brief and argument, it is apparent that the Court has unwittingly done an injustice to petitioner, and especially to his counsel, in its statement arising from a misunderstanding of petitioner's position, that "it is conceded in this case donee could have appointed to her estate or her creditors." Neither the briefs nor argument, oral or written, of counsel, will appear in the official volume of the United States Supreme Court Reports in which the opinion of the Court will appear. All readers of this opinion will naturally assume that the statement by the Court is correct; that counsel for petitioner through lack of legal ability or sheer stupidity, conceded away his client's case; and that he admitted, in effect, before this court, that its decision should be against the petitioner! This is a grave reflection, unintentional even though it be, upon the legal ability of counsel for petitioner and a serious damage to his professional reputation, after a practice of thirty-three years as a member of the bar of this court.

As an additional ground for a rehearing, the petitioner shows that this Court in its opinion states that Congress has adopted the administrative regulation (Treasury Reg. 80) defining a general power of appointment to be "ordinarily, one to appoint to any person or persons in the discretion of the donee of the power."

The Court thus declares the regulation a valid part of the Revenue Act, despite the fact that the word "ordi-

narily" makes the regulation, and consequently the statute, indefinite, vague, uncertain, and of limited application. (59 C. J. 601.) This administrative regulation does not define a general power for all cases. Formerly it did, in Regulations 37, but that regulation applicable in this case was amended by simply inserting the word "ordinarily" before the definition.

If Congress adopted the regulation, it adopted it with the word "ordinarily" as a part of it, and this word should be given its natural effect and not deleted from the regulation in construing its meaning and effect.

The Court was informed, during the argument, of the reason for inserting the word "ordinarily" in Regulation 80. It is not denied that the word "ordinarily" was inserted in the later regulation in order to provide for exceptions to the general rule and exclude from the operation of that rule all powers which had been held under local law *not* to be general powers, despite the fact that they were powers to appoint to any "person or persons," *by will*. As counsel for petitioner stated in his oral argument, the States in which the local law has so held, in addition to New York and Wisconsin, are the States of Pennsylvania and Vermont.

PRAYER.

Petitioner prays for the reasons herein set forth that the judgment of the Court be vacated and the cause be reheard and reconsidered; or if the judgment of this Court be that this petition must be denied, that the Court eliminate from its opinion the words shown in italics (Cert. Op. p. 2):

"Although it is conceded that, under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors."

and eliminate the words shown in italics (Cert. Op. p. 3):

"As it is conceded that, the decedent in this case could have appointed to her estate or to her creditors."

That in lieu of the words (Cert. Op. p. 2) *"although it is conceded that"* the following words: *"we hold that"* be substituted therefor, and that in lieu of the words (Cert. Op. p. 3) *"as it is conceded that,"* the following words: *"we hold that"* be substituted therefor.

Respectfully submitted,

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that the foregoing petition is, in our opinion, well founded in law, is not interposed for delay, and is presented in good faith.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

"EXHIBIT A"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,**

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

BRODE B. DAVIS, being first duly sworn, on oath deposes and says that he is the counsel for the petitioner in the above entitled cause; that during the oral arguments of counsel in said cause before the Supreme Court on January 4 and 5, 1940, Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?" Counsel for petitioner answered: "She could not."

BRODE B. DAVIS.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

THOMAS S. DOUGHERTY,
Notary Public.

(SEAL)

"EXHIBIT B"

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1939**

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,**
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

ALVIN V. NYGREN, being first duly sworn, on oath deposes and says that he is associate counsel for the petitioner in the above entitled cause; that counsel was present in the Supreme Court on January 4 and 5, 1940, while the oral arguments of counsel were being made before the Court.

Affiant further states that during the course of said arguments Mr. Justice Roberts asked the following question: "Could the decedent have appointed to her estate or her creditors?" And that Brode B. Davis, Counsel for petitioner answered: "She could not."

ALVIN V. NYGREN.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

(SEAL)

THOMAS S. DOUGHERTY,
Notary Public.

"EXHIBIT C"

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1939**

No. 210

**J. EARL MORGAN, EXECUTOR OF THE ESTATE OF
ELIZABETH S. MORGAN, DECEASED,**
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**STATE OF WISCONSIN }
COUNTY OF WINNEBAGO } ss.**

J. EARL MORGAN, being first duly sworn, on oath deposes and says that he is the Executor of the Estate of Elizabeth S. Morgan, Deceased, and as such Executor is the petitioner in the above entitled cause.

Affiant further states that neither he nor his counsel nor any one representing him, has ever, to his knowledge, conceded, directly or by inference, by written or spoken word, that the decedent, Elizabeth S. Morgan, could have appointed to her estate or her creditors.

And further affiant sayeth not.

J. EARL MORGAN.

Subscribed and sworn to before me this 17th day of February, A. D. 1940.

**R. MORRIS REDFORD,
Notary Public.**

My commission expires February 6, 1944.

(SEAL)

SUPREME COURT OF THE UNITED STATES.

No. 210.—OCTOBER TERM, 1939.

J. Earl Morgan, Executor of the
Estate of Elizabeth S. Morgan,
Deceased, Petitioner,

vs.

Commissioner of Internal Revenue.

On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Seventh
Circuit.

[January 29, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

We took this case because it raises an important question as to the construction of the Revenue Act of 1926, § 302(f), amended by the Revenue Act of 1932, § 803(b).¹

The question is to what extent and in what sense the law of the decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of the statute.

The petitioner is the executor of Elizabeth S. Morgan who was the donee of two powers of appointment over property held in two trusts created by her father by will and by deed. The persons named are, or were, at death, citizens of Wisconsin. It is unnecessary to recite the terms of the trusts. Suffice it to say that under each, property remaining in the trustees' hands for Elizabeth S. Morgan was given at her death, to the appointee or appointees named in her will, with gifts over in case she failed to appoint. Under both trusts, if in the judgment of the trustees, property going to any beneficiary would be dissipated for any reason, or

¹ 44 Stat. 9, 71, 47 Stat. 169, 279; 26 U. S. C. § 411.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . . except in case of a bona fide sale for an adequate and full consideration in money or money's worth; . . ."

improvidently handled, the trustees were to withhold any part of such property; with directions for disposition, in such event, of what was withheld. The decedent appointed in favor of her husband.

The Commissioner ruled that the value of the appointed property should be included in the gross estate and determined a tax deficiency. The Board of Tax Appeals approved his action.² The Circuit Court of Appeals affirmed the Board's decision.³

Although ~~it is argued that~~ under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors, the petitioner urges that, by statute and decision, Wisconsin has defined as special a power such as she held.⁴ The respondent urges that this is not a correct interpretation of the State law. We find it unnecessary to resolve the issue, since we hold that the powers are general within the intent of the Revenue Act, notwithstanding they may be classified as special by the law of Wisconsin.

State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.⁵

None of the revenue acts has defined the phrase "general power of appointment". The distinction usually made between a general and a special power lies in the circumstance that, under the former,

² 36 B. T. A. 588.

³ 103 F. (2d) 636.

⁴ "Sec. 232.05: *General Power*. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

"232.06. *Special Power*. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

See *Will of Zweifel*, 194 Wis. 428; 216 N. W. 840; *Cawker v. Dreutzer*, 197 Wis. 98; 221 N. W. 401.

⁵ *Burnet v. Harmel*, 287 U. S. 103, 110; *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 310; *Palmer v. Bender*, 287 U. S. 551, 555; *Thomas v. Perkins*, 301 U. S. 655, 659; *Heiner v. Mellon*, 304 U. S. 271, 279; *Lyeth v. Hoey*, 306 U. S. 188, 193.

the donee may appoint to anyone, including his own estate or his creditors, thus having as full dominion over the property as if he owned it; whereas, under the latter, the donee may appoint only amongst a restricted or designated class of persons other than himself.⁶

We should expect, therefore, that Congress had this distinction in mind when it used the adjective "general". The legislative history indicates that this is so.⁷ The Treasury regulations have provided that a power is within the purview of the statute, if the donee may appoint to any person.⁸

With these regulations outstanding Congress has several times reenacted Sec. 302(f), and has thus adopted the administrative construction. That construction is in accord with the opinion of several federal courts.⁹

The petitioner claims, however, that the decision below is in conflict with two by other Circuit Courts of Appeal.¹⁰ The contention is based on certain phrases found in the opinions. We think it clear that, in both cases, the courts examined the local law to ascertain whether a power would be construed by the state court to permit the appointment of the donee, his estate or his creditors, and on the basis of the answer to that question determined whether the power was general within the intent of the federal act.

As ~~it is conceded that~~ the decedent in this case could have appointed to her estate, or to her creditors, we hold that she had a general power within the meaning of Sec. 302(f). This conclusion is not inconsistent with authorities on which the petitioner relies,¹¹ holding that, in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income sought to be reached by the statute.

⁶Sugden on Powers (8th Ed.), p. 394; Farwell on Powers (2d Ed.), p. 7.

⁷House Rep. No. 767, 65th Cong., 2nd Sess., pp. 21-22.

⁸Regulations 63 (1922 Ed.), Art. 25; Regulations 68 (1924 Ed.), Art. 24; Regulations 70 (1926 and 1929 Eds.), Art. 24; Regulations 80 (1934 Ed.), Art. 24.

⁹Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600; Stratton v. United States, 50 F. (2d) 48; Old Colony Trust Co. v. Commissioner, 73 F. (2d) 970; Johnstone v. Commissioner, 76 F. (2d) 55.

¹⁰Whitlock-Rose v. McCaughn, 21 F. (2d) 164; Leser v. Burnet, 46 F. (2d) 756.

¹¹Poe v. Seaborn, 282 U. S. 101; Freuler v. Helvering, 291 U. S. 35; Blair v. Commissioner, 300 U. S. 5; Lang v. Commissioner, 304 U. S. 264.

The petitioner's second position is that, inasmuch as the trustees had an unfettered discretion to withhold principal or income from any beneficiary, they could exercise their discretion as respects any appointee of the decedent. This fact, they say, renders the power a special one. Assuming that the trustees could withhold the appointed property from an appointee, we think the power must still be held general. The quantum or character of the interest appointed, or the conditions imposed by the terms of the trust upon its enjoyment, do not render the powers in question special within the purport of § 302(f). The important consideration is the breadth of the control the decedent could exercise over the property, whatever the nature or extent of the appointee's interest.

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.